

VOL. XVII

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on March 25, 2013.

APPEARANCES:

AARON J. MANGO,
Assistant United States Attorney,
ROCKY PIAGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

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JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
Sheila Henderson, Paralegal

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2
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8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

WITNESS	PAGE
MICHAEL IANNELLO	
Direct Examination by Mr. Personius	3616
Cross-Examination by Mr. Mango	3647
Redirect Examination by Mr. Personius	3657
Recross-Examination by Mr. Mango	3680
PHILIP FLAX	
Direct Examination by Mr. Mango	3680
Cross-Examination by Mr. Linsin	3701
Redirect Examination by Mr. Mango	3721
JURY CHARGE CONFERENCE	3743
JURY CHARGE	3756
DEFENDANTS' EXHIBITS	EVD.
SSSS	3630
OOOO	3685
GOVERNMENT EXHIBITS	EVD.
48	3641
212	3688

1 (Jury not present in the courtroom.)

2 THE COURT: If we could get Tonawanda
3 Coke, please.

4 Is there anything preliminary we have to do?

5 MR. MANGO: May I consult with counsel for
6 one moment before I answer that question?

7 THE COURT: Yeah. I'm going to take 15
8 anyway right now. The jury's not here yet, so
9 that'll -- I'm sorry?

10 MR. LINSIN: The only issue I was going to
11 raise potentially, Mr. Iannello is our first and
12 last witness this morning. Before we then rested I
13 wanted to resolve this issue of the chart that we
14 had offered in connection with Miss Williams'
15 testimony.

16 Over the weekend the government provided a
17 chart they expect to utilize with -- I believe
18 with -- in connection with Mr. Flax's rebuttal
19 testimony today. And I can represent, at least on
20 behalf of Tonawanda Coke, we -- we would not oppose
21 the admission of that chart. I wasn't sure if the
22 government was intending to offer it, but I thought
23 it might be helpful to clarify that before the
24 Court considered this issue.

25 THE COURT: Okay. Do you know -- have you

1 seen it and reviewed it?

2 MR. MANGO: Oh, yes, Judge. We've worked
3 on this chart this weekend, and this is the chart
4 we provided to defense for our rebuttal witness.

5 THE COURT: Well, there's no objection to
6 that chart, right?

7 MR. LINSIN: Well --

8 THE COURT: Or is it contingent upon --

9 MR. LINSIN: -- my hope in making this
10 suggestion was that if the government was not going
11 to oppose ours, then we would not oppose theirs.
12 Yes. If that seems to be a reasonable quid pro
13 quo.

14 THE COURT: Well, have you had made any
15 adjustments --

16 MR. LINSIN: Your Honor, we have. And I
17 would be happy to offer the adjustments that we
18 have made for the Court's review. We believe we
19 addressed the issues, at least as we understood
20 them, in connection with comments the Court had
21 made. I've not shown this revised version to
22 government counsel, but would be happy to do so.

23 THE COURT: All right. Why don't you do
24 that. We'll take 15 minutes, and then the
25 government made a submission yesterday, I think --

1 or, no, that was your submission yesterday with
2 respect to the chart.

3 MR. LINSIN: We made a submission, your
4 Honor, in connection with the jury charge issues,
5 yes.

6 THE COURT: Okay. We'll see you in about
7 15, and then we'll see where the jury is at this
8 point. Thank you.

9 MR. LINSIN: Thank you, your Honor.

10 (Short recess was taken.)

11 (Jury not present in the courtroom.)

12 THE COURT: Okay. Miss Labuzzetta, if you
13 would call the case, please.

14 THE CLERK: Criminal case 10-219, United
15 States of America versus Tonawanda Coke and Mark
16 Kamholz.

17 THE COURT: Okay. The attorneys and
18 parties are all present, and the jury is here. I
19 do have to resolve the matter of Ms. Majerowski's
20 availability, and so we'll do that today.

21 As far as the matter of the chart, Mr. Linsin,
22 if you want to bring that up at this point, we'll
23 deal with it.

24 MR. LINSIN: Thank you, your Honor.

25 Sheila, if you could call up, so the Judge

1 could review it, Defendant's Exhibit 0000 as
2 modified.

3 And if I may, your Honor, explain that
4 consistent with Miss Williams' testimony and more
5 completely consistent with Miss Williams'
6 testimony, we have made the following modifications
7 to the chart that was displayed during her
8 testimony last week.

9 We have added a negative arrow descending from
10 the 261.4(a) exemption box to indicate that if the
11 material or its handling does not meet that
12 exemption, that it is -- the analysis must be
13 returned to the hazardous waste box, the purple
14 box.

15 We have added below that purple box the
16 indication that if, in fact, the material meets one
17 of the definitions of a hazardous waste, then a
18 permit is required for either storage or disposal.
19 We did not include treatment, because that is not
20 one of the alleged violations in the case.

21 And then on the left-hand side of the chart we
22 have added the parenthetical clause below the "not
23 a RCRA waste" box, which states that these are
24 examples of materials, slash, activities that do
25 not meet the definition of solid waste.

1 And we have retained here, your Honor, only
2 those examples that Miss Williams testified as, in
3 her opinion, being relevant to her analysis for the
4 management of the activities in question here. As
5 the Court may recall, there had been other examples
6 in the original chart, and we thought it would be
7 clearer, more faithful to her testimony, to simply
8 have those listed that were, in fact, referenced by
9 her as examples.

10 So we have modified the chart in a way that we
11 believe more fully comports with and is faithful to
12 her testimony. As the Court may recall, we -- we
13 moved this exhibit during her testimony, and the
14 Court reserved judgment, as I recall. We have had
15 discussions with counsel during the break, and
16 unfortunately -- I will let Mr. Mango speak, but my
17 understanding is the government will continue to
18 oppose receipt of this exhibit.

19 THE COURT: Okay. And we -- and I was in
20 agreement with this, that this cannot be admitted
21 under 1006.

22 Let me ask you this. You know -- and why do we
23 have those light rays on the left side of the
24 chart? Can that be --

25 MR. LINSIN: Your Honor, my understanding,

1 I believe this is simply the chosen background. We
2 would be happy, obviously, to make this -- the
3 background completely neutral and consistent. I'm
4 confident that could be easily resolved, your
5 Honor. Honestly, I had not even noticed it. But I
6 believe it's just a template that was selected and
7 was not meant to influence or be anything
8 substantive.

9 THE COURT: All right. Because I think it
10 makes it more difficult. It doesn't come out as
11 pronounced, to read, and I think that's
12 problematic. It was the same on the other draft.
13 So I'll ask you to take a look at that, if I do
14 admit it, and make it entirely a neutral
15 background.

16 MR. LINSIN: Okay.

17 THE COURT: And there will be more
18 definition that way, I think.

19 Mr. Mango, the government objects?

20 MR. MANGO: Yes, your Honor. The
21 government does intend, and we've provided now up
22 to the Court -- we can pull it up on the screen, as
23 well, if you would like to see the summary chart
24 the government is going to use during our rebuttal
25 case if Mr. Flax does testify in rebuttal. I'm

1 assuming that we'll, you know, be able to put him
2 on.

3 But we do oppose that chart, the revised chart,
4 because our summary chart we were not intending to
5 introduce as substantive evidence. I --

6 THE COURT: This one that's on the screen
7 now?

8 MR. MANGO: This one that's on the screen.
9 Consistent with our position with the other chart
10 is I really don't think, your Honor, under 611(a)
11 pedagogical exhibits should be admitted as
12 evidence, especially pedagogical exhibits that
13 really discuss the law, as Miss Williams' chart
14 does, and Mr. Flax's chart.

15 I -- so that's -- that's just the -- one of the
16 reasons we think any revised Williams chart should
17 not be admitted.

18 The other concern I have is this chart is now
19 clearly different than what the jury saw,
20 Miss Williams' chart. And I do believe that for
21 anything to be admitted into evidence there needs
22 to be live witness testimony to have that evidence
23 introduced substantively. And my recollection of
24 her testimony does differ. I remember, going back
25 to her testimony, I believe she said commercial

1 chemical products have no bearing on this case;
2 yet, they're still on this chart.

3 THE COURT: Miss Henderson, bring yours up
4 again, please.

5 Now, where are you referring, Mr. Mango?

6 MR. MANGO: In the lower left where it
7 says: Commercial chemical product return to
8 process. Substitute direct reuse feedstock
9 substitute for commercial chemical product.

10 Again, it's my recollection that she had said
11 that a CCP, as she used on her original chart,
12 the -- because I do have the original here -- the
13 initials CCP were used. And I believe she
14 testified that CCP has really no bearing on this
15 case.

16 But I'm just more concerned with, after
17 Mr. Flax's testimony, if -- if, again, he testifies
18 on rebuttal, there's certain issues in this chart
19 that, when you read the regulations, in this white
20 box here this is not what the regulations say.
21 The -- the regulations don't say "used on the land"
22 in that. The regulations do not say "used as a
23 fuel unless that fuel is non-waste fuel." That's
24 not what the regulations say. So, not only do we
25 oppose it on just pure 611 grounds --

1 THE COURT: What does the regulation say,
2 in your view?

3 MR. MANGO: Which, your Honor, we have
4 added it to our chart. But the regulations are
5 very clear that a definition of solid waste is,
6 "used to produce a fuel," not "used as a fuel."
7 That's not what it says. It says -- I'm reading
8 from 261 -- 40 CFR 261.2(c)(1) -- I'm sorry --
9 (c)(2)(B), which is, solid -- it's not a solid
10 waste if it's used to produce a fuel or otherwise
11 contained in fuels.

12 That's a little different than "used as a fuel
13 unless that fuel is a non-waste fuel."

14 THE COURT: And what's the "used on land"
15 language that you disagree with?

16 MR. MANGO: The "used on land" language,
17 according to Mr. -- again, the testimony we're
18 going to highlight, there's really two land
19 questions when you recycle a product and there is
20 an issue with the land. The first is -- well, this
21 one, I believe she's trying to -- trying to
22 encompass 261.2(c)(1)(B), which says, "used to
23 produce products that are applied to or placed on
24 the land or are otherwise contained in products
25 that are applied to or placed on the land."

1 That's what I believe she's trying to encompass
2 as used on the land. But this white box completely
3 ignores the portion of the regulation immediately
4 subsequent to -- or preceding that, which says,
5 "The material is a solid waste when it is" -- and
6 this is nowhere in this chart -- "applied to or
7 placed on the land in a manner that constitutes
8 disposal."

9 That's exactly what we have here, based on the
10 Court's definition of disposal, which is totally
11 absent from this white box. So I think -- I think
12 to introduce this would be -- would do an injustice
13 to what the regulations actually say.

14 THE COURT: Okay. Mr. Linsin.

15 MR. LINSIN: Your Honor, I will go back.
16 Part of the difficulty here, of course, is that
17 counsel in one breath is objecting that this is
18 intended as a recitation of the law, and then is
19 also -- is then objecting that it does not
20 precisely quote the law.

21 THE COURT: Or the testimony.

22 MR. LINSIN: Well, your Honor, I disagree
23 on that regard. I do agree in one respect, that
24 Miss Williams testified that commercial chemical
25 products are not relevant. I left that sub-bullet

1 in in its entirety. Counsel is correct that
2 Miss Williams did not reference commercial chemical
3 product in that regard.

4 What -- what I -- what I believe is, in fact,
5 faithful to the discussion and the -- to
6 Miss Williams' testimony is that the discussion
7 in -- in this white box focused on whether or
8 not -- and the whole major heading here is whether
9 or not the material is discarded. And she offered
10 these as examples of conditions within the
11 regulation defining solid waste that illustrate
12 whether something is discarded. And used on the
13 land, I believe, is -- is -- and her testimony was
14 relating to products that were applied to or placed
15 on the land. And that is exactly the language that
16 has been quoted here.

17 I also believe that she spoke at some length
18 about this definition of solid waste focusing on
19 whether or not the material was discarded. And
20 that, I believe, would constitute this issue --
21 incorporate this issue of applied to or placed on
22 the land in a manner that constitutes disposal.
23 The concept of land disposal, I believe, is
24 captured both in Miss Williams' testimony
25 concerning solid waste, but also then with regard

1 to the exemption itself on the right-hand box.

2 So I -- this was not represented in
3 Miss Williams' testimony as a verbatim recitation
4 of the regulation. It was offered as a summary of
5 her testimony regarding the elements in the solid
6 waste definition that she deemed relevant.

7 If counsel believes, in the course of
8 Mr. Flax's testimony, that he can poke holes in
9 this or indicate why it is defective, that's one
10 thing. But I don't believe it is reasonable to say
11 that this is not faithful to Miss Williams'
12 testimony, save for the comment here about
13 commercial chemical product, because she testified
14 repeatedly both on direct and cross that this issue
15 of discard, this issue of whether something was
16 disposed of on the land or elsewhere, was central
17 to the definition and assessment of whether the
18 material was a solid waste. And I believe that
19 that concept is clearly captured in the bullets
20 that have been included in here.

21 And the point here, your Honor, is, whether
22 counsel believes that this is -- that
23 Miss Williams' opinions are accurate or whether
24 their expert believes they are accurate, that is a
25 matter for the jury to assess. But Miss Williams

1 testified that this is a chart she prepared, she
2 testified in a manner that is consistent with this
3 chart, and we believe it is reasonable, and we
4 believe the Court has discretion under 611 to
5 permit the admission of exhibits like this when the
6 Court believes they could assist the trier of fact
7 in understanding the testimony. I believe that's
8 exactly what this chart does.

9 THE COURT: All right. Well, what is your
10 position with respect to Mr. Mango's point that
11 bullet point -- open circle in the white box number
12 4, with respect to used as a fuel. He says it's
13 not accurate with respect to the regulation as well
14 as the testimony, in that it should read something
15 to the extent of to the production of a fuel?

16 I think that was the terminology, Mr. Mango?

17 MR. MANGO: Yes, your Honor. The
18 terminology says, "used to produce a fuel or
19 otherwise contained in fuels." That's the language
20 from the regulations.

21 And before -- again, my only comment, your
22 Honor -- obviously we defer to the Court. If the
23 Court does introduce this, then clearly we would
24 want to introduce ours, but the government's
25 position is they should just both be as teaching

1 aids at this point.

2 THE COURT: All right. I want to clarify,
3 though, and resolve the "used to produce as a
4 fuel," that language.

5 MR. LINSIN: Well, there are a couple of
6 points, your Honor. To be -- I do not recall, as I
7 sit here, precisely what Miss Williams testified,
8 and so I'm not going to represent to the Court that
9 I do. I believe the terminology is -- is -- the
10 distinction in the terminology is not that
11 critical, especially in light of this fact, your
12 Honor. In the indictment itself the government has
13 described coke as a material -- one moment,
14 please -- and I'm quoting now from paragraph 3 of
15 the indictment -- "Coke is used in the steel mill
16 and foundry industries as an additive in the
17 steel-making process." An additive, not as a fuel.

18 The government has described coke as a
19 component in the mixture of a material, not as a
20 fuel in the production of material.

21 I do believe that Miss Williams testified about
22 this. I anticipate, given what counsel has said,
23 Mr. Flax will be testifying about it. My point is
24 I do not believe that the distinction "used to
25 produce" or "used as" is all that critical to the

1 analysis here. If -- we'll be happy to check our
2 notes with regard to Miss Williams' testimony on
3 this point. If her testimony included the wording
4 "to produce," we would, as we've demonstrated, be
5 happy to amend this to make sure it is consistent
6 with her testimony, but I just can't represent to
7 the Court that I have a specific memory on this.

8 THE COURT: Okay. You know, I think I had
9 mentioned last week that I thought it was somewhat
10 problematic to proffer this as a summary of the
11 testimony of the witness and -- of Miss Williams.
12 I'm not sure it is that. I mean, it's -- it comes
13 across by way of that it's captioned as a summary,
14 if you will, of the law, which I think would be
15 problematic, and I'm not sure that -- the
16 caption -- I'm not sure that the caption makes
17 clear what it is, which I think has to be resolved,
18 because I don't want the jury to get the wrong
19 impression.

20 I think in some respects this can be very
21 helpful, but if it reflects the law, I'm not sure
22 it's -- it would be admissible for that purpose.
23 If it's a summary of the testimony, the way it's
24 captioned I'm not sure that it reflects that. So I
25 think there has to be some modification, and I'm

1 willing to give it another go, because I think it
2 can be helpful, and I would consider admitting it
3 under 611. But I would admit it -- I will admit
4 the government's. That's the quid pro quo here.

5 MR. LINSIN: And, your Honor, as we've
6 indicated, we would not have an objection on that
7 score. We think -- this is not meant to supplant,
8 as I trust the Court understands, the Court's
9 guidance on the law. We would be happy to add to
10 the caption, if the Court believes it would be
11 helpful, Miss Williams' opinions regarding what
12 materials are regulated as waste or something to
13 that effect.

14 THE COURT: I think that has to be done.
15 Because it's technically not a summary of all of
16 her testimony, and I think that's part of the
17 government's objection. I think that's legitimate.
18 I think it cannot summarize the law as it stands.
19 I think that's a legitimate. But if it's -- if
20 it's an opinion with respect to the application of
21 the law to the facts, I think the jury needs some
22 guidance. And I think we sense that from the
23 questions, which I thought were really very good
24 questions under the circumstances.

25 So, you know, with the background

1 modifications, with maybe an effort to see just
2 what was testified to on the fuel open circle
3 point, and a rearticulation of the caption, I will
4 consider admissibility as a constructive aid under
5 611 to the handling of testimony and the
6 understanding of the testimony. And the quid pro
7 quo with that is that the government's exhibit will
8 similarly be admitted. Okay?

9 MR. LINSIN: All right. We will do so,
10 your Honor.

11 MR. MANGO: Your Honor, I just intend
12 during Mr. Fax's testimony, obviously as a
13 rebuttal, to reference Defendant's 0000, and I
14 didn't know if at this point we should be
15 referencing the original Defendant's 0000 during
16 his testimony. Because I'd like to pull it up on
17 the screen, because he's going to say what he
18 agrees with, what he doesn't agree with, as would
19 be proper with a rebuttal witness.

20 THE COURT: No. Put that one aside. Work
21 with, until we get it resolved, this 0000.

22 MR. MANGO: Okay.

23 THE COURT: This is the one you showed to
24 Flax, but we'll try to get it modified to our
25 satisfaction before Flax becomes the rebuttal

1 witness. Okay?

2 MR. MANGO: Yes, your Honor.

3 MR. LINSIN: All right. That will -- if
4 we could have over lunch to get that, your Honor
5 because we just don't have the capacity here to
6 make modifications. Miss Henderson could go back
7 over lunch to do that. We'll certainly work to
8 accomplish that.

9 THE COURT: All right. Now, you have a
10 witness --

11 MR. LINSIN: Yes.

12 THE COURT: Is there anything else that
13 we --

14 MR. LINSIN: One other very brief just
15 logistical matter, your Honor. Mr. Glasner will be
16 departing town later today, probably sometime after
17 lunch, to return home for the Passover observance.
18 He will be gone the end of the day today, and
19 tomorrow, and returning later on Wednesday. We
20 would just ask the Court, since I presume it's
21 something the jurors would notice, that Mr. Glasner
22 had a -- is attending to personal matters and will
23 be returning later in the week, something to that
24 effect. So, thank you, your Honor.

25 THE COURT: Okay. No problem. Okay.

1 MR. MANGO: I would just propose maybe
2 instead of a lunch -- I don't expect Mr. Iannello's
3 testimony to take that long. It's possible we
4 could be done by 11:00 o'clock with Mr. Iannello,
5 and maybe it would make sense to then just take an
6 hour break instead of -- you know, send the jury
7 out. I just propose that just so the Court knows
8 that I don't expect to be long with Mr. Iannello
9 either.

10 THE COURT: Okay. Then as far as Mr. Flax
11 is concerned, how long?

12 MR. MANGO: Not long either, your Honor.
13 A very brief rebuttal witness. I think 15 minutes
14 on my side, 15, 20 minutes.

15 THE COURT: Okay. And then both sides
16 will have rested?

17 MR. MANGO: Yes.

18 THE COURT: Okay. Let's see where we are
19 timewise, and then we'll go from there. Okay.

20 MR. PERSONIUS: Judge, with Mr. Iannello,
21 he's the firefighter --

22 THE COURT: Yes.

23 MR. PERSONIUS: -- and we've discovered
24 there is a 13-second video of this fire. We've
25 marked it as a defense exhibit. We're going to

1 offer that. I don't think the government is going
2 to oppose that offer. And I just want you to be
3 aware of that. We will get it into evidence.

4 My thought is it's almost clearer if you play
5 it in the smaller size that it comes in. If you
6 blow it up so it fills up the entire screen, it
7 almost gets too blurry so that it's very hard to
8 see. So if it's smaller so if it takes up a
9 fraction of the screen, it's almost easier to see.
10 I just want you to be aware of that.

11 THE COURT: All right. We have two drop
12 screens that go from ceiling to floor in the
13 courtroom, which I've been anxious to use,
14 Mr. Personius. You're not anxious to try them out,
15 I take it then.

16 MR. PERSONIUS: Well, if you expanded them
17 to that level, they would be completely useless,
18 Judge.

19 THE COURT: All right. Yeah, that's fine.

20 MR. PERSONIUS: Okay.

21 THE COURT: That's fine. I take it
22 there's no objection?

23 MR. MANGO: Yeah, no objection, your
24 Honor. In fact, because it's so quick and small,
25 it may make sense to play it a couple of times.

1 MR. PERSONIUS: And the other thing I
2 intend to do is to stop it a couple of times in the
3 middle of it is helpful too. It becomes like a
4 still shot.

5 THE COURT: Okay. All right. Let's bring
6 the jury in now, and then after we're done with
7 Mr. Iannello I'll talk with Miss Majerowski, and
8 we'll find out what her situation is and how we
9 handle that.

10 Chris, if you would, please. Good morning.

11 (Jury seated.)

12 THE COURT: Good morning. Welcome back.
13 Good to see everybody. It wouldn't be a Monday if
14 it weren't our chance to see you again. So thank
15 you. Please have a seat.

16 Okay. We are back on in the case of United
17 States versus Tonawanda Coke Corporation and Mark
18 Kamholz, defendants. I think we're all
19 knowledgeable now in terms of who our jurors are and
20 roll call waived. And, of course, you know, ladies
21 and gentlemen, that the parties in this case are
22 two defendants, and they're represented by the
23 various attorneys, and I think I'll dispense with
24 the introductions today. You know the technicians,
25 as well, the paralegals that are doing our work on

1 the monitors for you in terms of the evidence, so I
2 think everybody is ready to go.

3 And we have, of course, Mr. Paul Saffrin, who
4 is the president of Tonawanda Coke, and Mark
5 Kamholz, who's the individual defendant, here as
6 well.

7 So, with that, and again I thank you for your
8 efforts on Thursday, and we ask you to keep your
9 minds open. Remember the government has the burden
10 of proof beyond a reasonable doubt. The burden
11 never shifts. The defense has chosen to put on a
12 case. We're in that case now. It doesn't have a
13 burden, though, and both defendants are entitled to
14 the presumption of innocence, which is in place for
15 purposes of this case until and if you decide that
16 the proof has satisfied you beyond a reasonable
17 doubt that either the corporate or the individual
18 defendant or both are guilty as charged on the
19 count that you are considering. And each count has
20 to be separately considered as to each defendant
21 and as to all of the essential elements of the
22 charge that applies to that particular count.

23 So, with that, I think the defense has another
24 witness. You're going to call that witness,
25 Mr. Personius?

1 MR. PERSONIUS: Yes, your Honor.

2 THE COURT: Okay.

3 MR. PERSONIUS: Your Honor, we call
4 Michael Iannello.

5 THE COURT: If you would approach the
6 witness box, sir, I'll tell you when to stop.
7 Right about there is good, and we'll have you turn
8 towards the jury and --

9 M I C H A E L I A N N E L L O, having been duly
10 sworn as a witness, testified as follows:

11 THE COURT: Okay. Mr. Witness, I think
12 you're positioned the right way. Speak to the
13 jury. They're here to listen to what you have to
14 say. Get a little closer to the microphone or
15 bring it towards you. You don't have to be right
16 on top of it. All you have to do is speak in a
17 conversational tone.

18 Do your best to answer concisely and directly
19 the question. Try not to volunteer any
20 information. That usually complicates things. If
21 the question calls for a yes or no, please try to
22 answer it in that fashion. That's helpful.

23 If you don't understand a question, ask the
24 lawyers or me to repeat the question, and I'll
25 direct that that be done, or I will do it myself.

1 If there's an objection, wait until I rule on
2 the objection, and then I will give you
3 instructions on whether to complete your answer,
4 start it again, wait for another question,
5 et cetera.

6 Do you understand?

7 THE DEFENDANT: I do.

8 THE COURT: All right. Sounds like you
9 will carry on the microphone, but state your full
10 name and spell your last name, please.

11 THE WITNESS: Michael Iannello. Last name
12 is I-A-N-N-E-L-L-O.

13 THE COURT: Okay. Thank you,
14 Mr. Iannello.

15 Your witness, Mr. Personius.

16 MR. PERSONIUS: Thank you, your Honor.

17 DIRECT EXAMINATION BY MR. PERSONIUS:

18 Q. Good morning, Mr. Iannello.

19 A. How are you, sir?

20 Q. I'm very good. Thank you. We've met before,
21 obviously.

22 A. That's correct.

23 Q. And you've also had an opportunity to meet with
24 the government regarding your testimony, correct?

25 A. Yes, I have.

1 Q. You've made yourself equally available to both
2 parties?

3 A. That's correct also.

4 Q. Now, you are a member of the Elwood Fire
5 Company?

6 A. Yes. The Elwood Volunteer Fire Company.

7 Q. Okay. And how long have you been a member of
8 that fire company?

9 A. I'm in my 15th year.

10 Q. Was there a time when you were the chief for
11 the fire company?

12 A. Yes.

13 Q. When was that, please?

14 A. I served as chief in '09 and 2010, and years
15 prior to that I was an assistant chief for six
16 years.

17 Q. And do you recall responding to a fire at the
18 Tonawanda Coke Company in July of 2008?

19 A. I do.

20 Q. Now, the Elwood Fire Company, does that have
21 some jurisdiction over the area where Tonawanda
22 Coke is located?

23 A. Two months out of the year we cover and we take
24 jurisdiction over what we call our District 1
25 commercial. July and January are Elwood's months.

1 Q. All right. So that during those two months, if
2 there was an event that occurred, for example, at
3 Tonawanda Coke, Elwood would be the primary
4 responding company?

5 A. That's correct.

6 Q. And then there are other companies that cover
7 that area during the other months of the year?

8 A. Yes.

9 Q. And this fire that you responded to at
10 Tonawanda Coke, do you remember when in 2008 that
11 was?

12 A. The date is July 8th.

13 Q. Of 2008?

14 A. 2008.

15 Q. All right. Now, do you remember how you first
16 discovered that there was a fire at Tonawanda Coke?

17 A. Yes, I do.

18 Q. Would you tell the jury how that happened,
19 please?

20 A. I was heading to a meeting in the town of
21 Tonawanda, traveling down Sheridan Drive, and I
22 noticed heavy black smoke from what at that time I
23 thought could have been, you know, River Road. I
24 was at the corner of Military and Sheridan, and I
25 radioed to my office, the dispatch office, asking

1 them if there was any incident that we needed to be
2 made aware of.

3 Q. And from making that contact did you determine
4 whether or not Elwood had been notified?

5 A. Not at that contact, no.

6 Q. All right. What did you do at that point then?

7 A. I informed them that I would be traveling
8 towards the area where the black smoke was and I
9 would report back to them.

10 Q. So what direction did you travel in then?

11 A. I continued west on Sheridan Drive.

12 Q. And were you able to track where the smoke was
13 coming from as you traveled?

14 A. Yes.

15 Q. And when you -- did you go to the end of
16 Sheridan?

17 A. I made my way over from -- Sheridan turns into
18 Grand Island Boulevard, and then I turned onto
19 Kenmore Avenue, and then I proceeded down Sawyer
20 Avenue to reach River Road.

21 Q. Okay. And when you got to River Road had you
22 heard back yet from the fire company?

23 A. I did not.

24 Q. All right. When you got River Road, what
25 direction did you proceed in?

1 A. I determined that the fire -- the smoke was
2 coming from Tonawanda Coke on River Road, and I
3 proceeded to head in that direction and make my way
4 up into Tonawanda Coke's driveway.

5 Q. And you could see, as you headed up the
6 driveway, the smoke on the Tonawanda Coke property?

7 A. That's correct.

8 Q. Could we, Lauren, please, put on the screen --
9 this is in evidence -- Government's Exhibit 105.37.

10 Do you see a photograph on the screen,

11 Mr. Iannello?

12 A. Yes, sir.

13 Q. And you and I have reviewed this before?

14 A. That's correct.

15 Q. Do you recognize what's depicted in this
16 photograph?

17 A. Yes, I do.

18 Q. Would you please tell the jury what you
19 recognize?

20 A. I recognize that -- the access road from River
21 Road into the plant, and I recognize the facility
22 through other pictures that I've seen and being
23 on-site.

24 THE COURT: If you'll tap the access road,
25 please.

1 BY MR. PERSONIUS:

2 Q. You can tap the screen, and you'll either get a
3 square or an arrow. Okay.

4 A. That's the access road to the facility.

5 Q. And just so it's clear to the jury, too, could
6 you please tap where River Road is?

7 Thank you. That's good.

8 So you proceeded up that access road?

9 A. That's correct.

10 Q. And what happened when you got -- was there a
11 guardhouse you came to?

12 A. Yeah. I was stopped at the guardhouse once I
13 got all the way up the access road into the
14 facility.

15 Q. All right. And what happened at that point?

16 A. I had asked the guard if there was an incident
17 that we needed to be notified of, if something was,
18 you know, out of control.

19 THE COURT: All right. Where is the
20 guardhouse?

21 Thank you.

22 BY MR. PERSONIUS:

23 Q. And did you get a response to that inquiry?

24 A. She wasn't -- it was a female guard. She was
25 not aware that there was any incident that needed

1 any more attention than what was going on.

2 Q. So what did you do at that point?

3 A. I suggested to her that in my opinion there was
4 something more to what was going on on the facility
5 than what she was notified of or hadn't been
6 informed of at that time. So I radioed to my
7 dispatch and told them that I thought we had an
8 incident that needed attention by the fire service.

9 Q. All right. And what -- at that point what did
10 you do after you made that radio call?

11 A. At that point they notified me back that
12 somebody from the facility had called, and that at
13 that moment -- we're notified to respond to fire
14 calls by a series of tones that go out over our
15 fire radios, and at that moment they had set the
16 tones off and dispatched the rest of the fire
17 service that would respond to that particular call.

18 Q. Did you then proceed onto the Tonawanda Coke
19 property?

20 A. I did.

21 Q. All right. And can you show us on this screen
22 what direction you went in, please?

23 A. I proceeded down a road that looks like it
24 appears to go through the middle of the facility,
25 which would be this road here.

1 Q. Okay.

2 A. And I made my way towards the -- towards the
3 incident.

4 Q. And by "the incident," you mean the smoke? Is
5 that what you were looking --

6 A. Yeah, where the fire was and the smoke was
7 being derived from.

8 Q. All right. We're going to go to another
9 photograph, and I want to draw your attention to
10 that long white building that part of my arrow is
11 on.

12 A. I see it.

13 Q. If you could, note where that is, and we'll see
14 if that's in the next photo that we put up.

15 Could you take this one down, please, Lauren,
16 and put up Government Exhibit in evidence 105.40.

17 Okay. In this photograph, Mr. Iannello, do you
18 see that long white building I put the arrow on in
19 the last photo?

20 A. I do.

21 Q. And does that help you determine where the
22 smoke was coming from?

23 A. That's correct.

24 Q. Okay. Could you show the jury with another tap
25 where you determined the smoke was coming from?

1 A. Up a little higher.

2 Q. All right.

3 A. A little bit -- it's not working on my screen.

4 Can you clear that?

5 Q. Want to try again?

6 A. Let's try that. That's better.

7 Q. Okay. Thank you. And did you proceed with
8 your vehicle in that direction?

9 A. That's correct.

10 Q. Are you able to tell us or show us on this
11 photograph, Exhibit 105.40, where you proceeded to?

12 A. The second one that I highlighted there is more
13 accurate.

14 Q. All right. Thank you. Now, as you went into
15 the Tonawanda Coke property and arrived at the
16 location you've noted on this photograph, did you
17 come into contact with anyone at Tonawanda Coke
18 that you spoke to about the fire?

19 A. Yes, I did.

20 Q. Who was that please?

21 A. Kevin Walsh.

22 Q. And do you know Kevin Walsh?

23 A. I know Kevin outside of Tonawanda Coke through
24 the fire service. He's a past chief of the Kenmore
25 Volunteer Fire Department.

1 Q. Did you have a conversation with Mr. Walsh
2 about this fire?

3 A. I did.

4 Q. Would you share that with the jury, please?

5 A. Basically, as I got out of my vehicle, I asked
6 Kevin what was going on, and he said we had an
7 incident here that got out of control, that plant
8 personnel could not handle. And he had called --
9 he was the one that called dispatch and called the
10 fire department to have us respond.

11 And I asked him a few questions about what was
12 going on, how the fire started, and I was informed
13 that it was ignited by some work that was being
14 done around the area of the point of the fire.

15 Q. Did Mr. Walsh describe for you what that work
16 was that was being done?

17 A. He may have at the time. I know welding had
18 something to do with it, but I couldn't say
19 specifically what they were doing.

20 Q. All right. Now, when you got to the point near
21 the fire where you've shown us that you stopped,
22 can you just tell us in your own words what you
23 observed?

24 A. Basically, it was an exterior fire that, from
25 my standpoint of being a fire chief, I would say

1 was a small building and some ground, grass, that
2 had been burning around this -- what we've been
3 calling a shack, that looked liked it had been
4 abandoned.

5 Q. All right. Lauren, would you take this picture
6 down, please, and put up in evidence Government
7 Exhibit 125.01.

8 We have another photograph on the screen,
9 Mr. Iannello. Do you recognize what's shown in
10 this picture?

11 A. Yes, I do.

12 Q. Would you tell the jury what you recognize,
13 please?

14 A. The brick building with the wood -- wood-type
15 structure roof and the wood frames was where the
16 fire -- the center of the fire was when I pulled up
17 to the scene. And grass -- I'm sorry -- grass and
18 grounds around it were also burning.

19 Q. Can you -- so the jury -- I think it's obvious,
20 but could you tap the building you're referring to?

21 All right. And there's a tank behind the
22 building?

23 A. That's correct.

24 Q. Do you see that? It's yellowish in color?

25 A. I do see it.

1 Q. All right. And can you show the jury, if you
2 can on this picture, if this is fair, where the --
3 what the scope of this fire was? Is that -- can
4 you show that on this photograph?

5 A. Will this allow me to circle?

6 Q. Yes. Absolutely.

7 A. I'd say it was contained to this area right
8 here, and there was -- behind this building in this
9 area there was some ground clutter that was
10 burning. You know, maybe grass or any rubbish that
11 might have been there, wood particles, or maybe
12 some scrap from something.

13 Q. We haven't covered this. I don't know how
14 important it is. What time of day was it when you
15 got there?

16 A. I'm just trying to think, that my appointment
17 where I was headed -- I want to say it was -- I'm
18 going to guess it was in the morning between 10:00
19 and noon. That's the best of my knowledge, without
20 looking at any records, when the incident occurred.

21 Q. You've shown us on this exhibit that's on the
22 screen, 125.01, with two different circles the area
23 where you -- you observed the fire when you arrived
24 there, is that correct?

25 A. That's correct.

1 Q. Now, how long were you at the -- at the scene?

2 A. From the time we were asked to respond and the
3 time we cleaned up, it was approximately three
4 hours.

5 Q. Okay. Did other fire companies also come to
6 the scene?

7 A. Yeah. My understanding is that six fire
8 companies responded and seven pieces of fire
9 apparatus, trucks, equipment, responded.

10 Q. One of those six would have been Elwood?

11 A. That's correct.

12 Q. Now, as you've shown the scope of the fire when
13 you got there, in Exhibit 125.01, during the period
14 of time you were there did the scope of the fire
15 expand?

16 A. Not to my knowledge. It was pretty contained
17 to that area.

18 Q. All right. Now, I'm going to put -- I'll try
19 to do this. Do you see where I put an arrow on the
20 right-hand side?

21 A. I do.

22 Q. And was the fire ever in that area?

23 A. Not that I know of. No, not to my knowledge.

24 Q. Okay. During your preparation to testify here,
25 were you provided with a -- a videotape?

1 A. Not --

2 Q. A film or something of the fire?

3 A. No. Nothing other than what was emailed to me
4 about something -- that 13-second video that you
5 mentioned. It was not a tape.

6 Q. That's why I fumbled when I said it. What
7 would you call it?

8 A. A digital video clip from an email.

9 Q. Did you view a digital video clip of the fire?

10 A. Yes, I did.

11 Q. All right. And was that a fair and accurate
12 depiction of at least part of the fire, that's
13 shown on that clip?

14 A. I would say yes, it is. It's my -- most --
15 that would compare to my recollection of the
16 incident.

17 MR. PERSONIUS: Your Honor, we've marked
18 that as Defense Exhibit for identification SSSS.
19 I'm happy to go through a foundation if necessary.

20 MR. MANGO: We have no objection, your
21 Honor.

22 MR. PERSONIUS: So, your Honor, what I
23 would propose, if we could then, that I'll ask
24 Sheila, please, once you confirm it's in evidence,
25 to put that up on the screen. Is that okay, Judge,

1 if we do that?

2 THE COURT: Yes. SSSS received in
3 evidence, may be published, no objection. We're
4 going to drop the lighting down a little bit.

5 MR. PERSONIUS: Thank you, Judge.

6 THE COURT: If you would, please.

7 (Defendants' Exhibit SSSS was received
8 into evidence.)

9 MR. PERSONIUS: Members of the jury, if
10 you look behind you, I think those wooden slats
11 are --

12 MR. MANGO: No, there is a shade that's
13 going to come behind it.

14 THE COURT: Okay. You've been here now
15 for 12 hours.

16 MR. PERSONIUS: Your Honor, does Mary have
17 any popcorn?

18 Your Honor, as I mentioned -- and we can do it
19 both ways. I -- from my looking at this, I think
20 even though this is small, it's clearer like this
21 than if we fill the whole screen. We can do it
22 both ways if you'd like us to.

23 THE COURT: No, let's try it this way.

24 MR. PERSONIUS: Try it this way? Okay.
25

1 BY MR. PERSONIUS:

2 Q. And before we do it, if I could, do you see
3 the -- the start of this video clip on the screen?

4 A. Yes.

5 Q. Okay. And can you just, for the jury, point
6 to -- do you recognize anything on the screen right
7 now?

8 A. Yes.

9 Q. Tell the jury what you recognize, please.

10 A. I recognize the -- the shed, the shack
11 building, and the tank behind the building that --
12 where the center of the fire was. The center of
13 origin.

14 Q. Can you tap the screen where you see the
15 building? I don't know if it'll work, but -- thank
16 you. And then where you see the tank.

17 That's great. Thank you. I'm going to take
18 that off. And what we're going to do, with the
19 Court's permission, Mr. Iannello, we're going to
20 play it through once, and then we'll go back and
21 maybe stop it a couple of times.

22 A. Okay.

23 MR. PERSONIUS: Okay. Could you please
24 play it, Sheila.

25 (The above-referenced video clip was

1 played for the jury.)

2 THE COURT: Okay. Enlarge it and play it
3 once. Okay.

4 BY MR. PERSONIUS:

5 Q. Great. Just so it's on the record, we just
6 finished playing it the first time?

7 A. Understood.

8 Q. Now we're going to play it again, filling up
9 the whole screen, and see how it looks.

10 (The above-referenced video clip was
11 played for the jury.)

12 MR. PERSONIUS: Judge, do you have a
13 judgment on which one is better?

14 THE COURT: No. You can work with either
15 one.

16 MR. PERSONIUS: Yeah. I didn't think the
17 big one was that bad.

18 THE COURT: No. It came across, I think,
19 reasonably well this time, so --

20 MR. PERSONIUS: I didn't think it was bad,
21 so maybe we'll try it with the big one.

22 THE COURT: Please.

23 BY MR. PERSONIUS:

24 Q. Now, the entire duration of that is about 13
25 seconds, that clip?

1 A. That's correct.

2 Q. Okay. Could we get it back up again, Sheila,
3 without playing it, please?

4 All right. Now, you've already shown us from
5 the smaller size where the tank is and where this
6 building is that you saw that was burning. The
7 smoke, there's some black smoke?

8 A. Yes.

9 Q. And from being present at the fire, did you
10 determine what the source of that black smoke was?

11 A. At the time I -- I assumed that the shack that
12 was burning, it was the roofing material that was
13 on the -- that made up the roof of that shack, and
14 any wood that was involved in the fire.

15 Q. All right. And have you since learned, from
16 talking to the government and talking to us, that
17 on the surface surrounding this tank -- on the
18 ground surrounding this tank there was some coal
19 tar?

20 A. That was mentioned to me, but at the time I
21 didn't know if there was anything like that
22 involved in the fire.

23 Q. Sheila, could we play this to -- and stop it,
24 please, at five seconds?

25 (The above-referenced video clip was

1 played for the jury.)

2 BY MR. PERSONIUS:

3 Q. Now, what we see is we see the black smoke and
4 some of this tank behind the smoke, correct?

5 A. That's correct.

6 Q. Where I put the arrow to the left of it, do you
7 see some white smoke coming out of the top of the
8 tank?

9 A. Yes.

10 Q. And are you able to tell the jury why there was
11 white smoke coming out of the top of the tank?

12 A. My estimate would be that it was caused by
13 whatever was heating up inside the tank and it was
14 venting out. That's probably a vent to the top of
15 that tank. And whatever was burning around it
16 could have possibly gotten in some of the access
17 points, so it was maybe a residual smoke from the
18 fire.

19 Q. Do you know whether or not the fire actually
20 traveled to the inside of this large tank?

21 A. I do not.

22 Q. Could we continue, Sheila, and stop, please, at
23 about 12 seconds?

24 (The above-referenced video clip was
25 played for the jury.)

1 BY MR. PERSONIUS:

2 Q. Okay. We've stopped this clip now at 12
3 seconds. And I'm going take this arrow off that's
4 on there. And again, where I put the one arrow,
5 could you tell the jury what that shows?

6 A. That looks to be the front of the shack and
7 flames inside the door of the shack.

8 Q. Okay. And I'm going to put another arrow over
9 and to the right of that. Do you see where that
10 other arrow is?

11 A. Yes.

12 Q. And was there fire over in that area?

13 A. No flames in that area. No fire.

14 Q. All right. And are you able on this screen to
15 again show the jury where, during the period of
16 time you were present, that the fire was focused?

17 A. I stood about 30 to 40 feet away from the shack
18 in this area here, but a little further back. Not
19 quite that close to the scene.

20 Q. And can you draw a circle around where the
21 fire -- where the fire was, please?

22 In that area?

23 A. Yes. Up into that area.

24 Q. All right. Now, one other question while we've
25 got it stopped here. And we can go back to a still

1 photo. But do you see this kind of white --
2 whitish rectangular item on the right side of the
3 screen where I put another arrow?

4 A. Yes.

5 Q. And do you know what that is?

6 A. After looking at pictures after, it's a -- it's
7 a disabled railcar, tanker car for a train.

8 Q. Do you recall whether or not that tanker car
9 was present when you were present for the fire?

10 A. In honesty, I do not recall that being there.

11 Q. All right. Thank you.

12 I think we can take that down now, Sheila.
13 Thank you. Could -- Lauren, could you please put
14 on the screen in evidence Government
15 Exhibit 125.03.

16 Do you see the photograph on the screen that
17 has the sticker 125.03, Mr. Iannello?

18 A. I do.

19 Q. Do you recognize what's shown in this picture?

20 A. I do.

21 Q. Now, can you tell the jury what -- what that is
22 on the right-hand side of the screen?

23 A. That is the shack that was the center of the
24 fire.

25 Q. Okay. Lauren, could you please put up

1 Government Exhibit 125.04, which is also in
2 evidence?

3 Do you recognize what's shown in this
4 photograph, Mr. Iannello?

5 A. I do.

6 Q. All right. Do you remember I asked you at the
7 end of the video clip about the white object that
8 you could see?

9 A. Yes.

10 Q. The white rectangular object?

11 A. Yes. Yes.

12 Q. Okay. And do you see that in this photograph?

13 A. Are you referring to the -- the front --

14 Q. That object.

15 A. Oh, okay. Because there was a -- object was
16 the building in the previous -- I do see that, yes.

17 Q. And is it your testimony you don't recall that
18 partially demolished tank being in that position
19 when you were in the fire?

20 A. That's correct. From my standpoint, it wasn't
21 in my -- my view.

22 Q. All right. Lauren, would you please put up --
23 again, this is in evidence -- Government
24 Exhibit 3.04.

25 Now, do you recognize, Mr. Iannello, what's

1 depicted in this photograph?

2 A. I recognize it from the photos I was shown by
3 both parties.

4 Q. Okay. Did you see what's depicted in this
5 photograph when you were at the fire scene?

6 A. I did not.

7 Q. And was any of the fire -- to your knowledge,
8 based on your observations, did any of the fire
9 involve this part of the property?

10 A. No, it did not.

11 Q. Okay. You can take that down, Lauren, please.

12 When the steps were being taken to put out the
13 fire, was -- do you know, was any water sprayed
14 inside the tank?

15 A. From my original report it did say that we had
16 stuck a hose line into an access panel inside the
17 tank.

18 Q. Do you know why that was done?

19 A. I would say it was probably done for cooling
20 purposes, just to kind of get a different angle at
21 the fire. You know, if there was anything in there
22 that could have been ignited, more of a cooldown.

23 Q. All right. During the period of time that you
24 were -- you were at the fire, did you see any
25 substances coming out of that large tank?

1 A. No, I did not.

2 Q. And once the fire apparatus was in place to put
3 out the fire, how long did it take to actually put
4 out the fire?

5 A. I think the extinguishing was done probably in
6 20 to 25, 30 minutes, and then the rest was what we
7 call overhaul. It would be maybe cooling down.
8 That's probably at the time we stuck the nozzle
9 inside the tank, cooling down the grounds after the
10 incident and just turning things over. That would
11 be considered overhaul. That probably took another
12 half hour to 40 minutes.

13 Q. Now, the term "hazmat," does that have meaning
14 to you as a fireman?

15 A. I know what it means, yes.

16 Q. Would you tell the jury what your understanding
17 is of that term?

18 A. A hazmat situation would be an incident
19 involving hazardous materials that would be suited
20 for a different type of response.

21 Q. Had you received any information, as you came
22 to the scene and while you were present at the
23 scene, that this was a hazmat circumstance?

24 A. I got no information, and I had no concern at
25 that point that it was a hazmat situation.

1 Q. And based on your experience at the scene in
2 putting out this fire, would it have made a
3 difference to you to have known that this may have
4 been a hazmat circumstance?

5 A. In my opinion, no.

6 Q. Now, at the conclusion of the work you did that
7 day, unexpected, did you then prepare some type of
8 report of this incident?

9 A. Every incident that we respond to has a report
10 attached to it for our fire company records.

11 Q. Okay. And was one prepared for this incident?

12 A. Yes. Yes, we did.

13 Q. You've looked at it?

14 A. Yes, I have.

15 Q. For identification, Lauren, could we please put
16 on the screen Government Exhibit 48, please?

17 Do you see on the screen a document that has in
18 the lower right a yellow sticker that says 48 on
19 it?

20 A. Yes.

21 Q. Do you recognize what this is?

22 A. Yeah. That's my Elwood Volunteer Fire
23 Company's fire report.

24 Q. Related to the Tonawanda Coke fire?

25 A. That's correct.

1 Q. From July 8 of 2008?

2 A. Yes.

3 MR. PERSONIUS: Your Honor, we offer it.

4 MR. MANGO: No objection, your Honor.

5 THE COURT: All right. 48 received, no
6 objection. May be published.

7 MR. PERSONIUS: Thank you, Judge.

8 MR. MANGO: It is multiple pages, your
9 Honor, just so the Court's aware of that.

10 THE COURT: Thank you.

11 MR. PERSONIUS: Thank you, Aaron.

12 (Government's Exhibit 48 was received into
13 evidence.)

14 BY MR. PERSONIUS:

15 Q. The first page of this exhibit, Mr. Iannello --
16 why don't we do this. It will be a little easier
17 to read.

18 Lauren, could you make the upper half larger,
19 please? Thank you, Lauren.

20 Do you see at the top, Mr. Iannello, there's a
21 reference to your fire company?

22 A. Yes, I do.

23 Q. And to the date?

24 A. That's correct.

25 Q. All right. Now, it also, in the area I'm going

1 to point to, in that area it talks about dates and
2 times?

3 A. Yes.

4 Q. That gives us the date again of July 8, 2008,
5 right?

6 A. Yes, it does.

7 Q. And it gives times ranging from 1114 to 1416.

8 A. That's correct.

9 Q. Would you tell the jury what those times
10 indicate?

11 A. The 1114 is military time when the initial
12 signal went out to call for fire service.

13 Q. And then the 1416 time?

14 A. That would be the time that the last piece of
15 apparatus called into service, and that's recorded
16 at the Town of Tonawanda dispatch.

17 Q. Now, let me get rid of that. And do you see
18 where I put another arrow. It's in box C. It
19 refers to incident type?

20 A. Yes, I do.

21 Q. And there is an entry there?

22 A. Yes.

23 Q. That says, "Outside rubbish fire, other"?

24 A. Yes.

25 Q. Did you select that as the description of this

1 fire?

2 A. Yes, I did.

3 Q. And can you tell the jury why you described it
4 in that fashion?

5 A. This particular piece of reporting software is
6 a very -- a large, layered piece of software, and
7 there's not many categories to select of what
8 the -- what the incident was. Our fire company
9 uses this piece just more as a tracking of our
10 personnel, and it's very general when it comes to
11 putting information in from an incident, per se,
12 like this one here. So you get to this section --
13 after you fill out the address and the location,
14 you get to Section C, and it limits you to what to
15 select to continue on with the reporting process.
16 So outside rubbish fire was the closest selection I
17 could have made to move forward with completing the
18 rest of the document.

19 Q. Okay. Thank you. Could you make it large,
20 this page large again, please, Lauren.

21 The only other thing on this page I want to
22 note, Mr. Iannello -- we're going to make a section
23 of the first page larger. Do you see the box that
24 says "Completed modules"?

25 A. Yes, I do.

1 Q. And there's a reference to a Hazmat 7?

2 A. Yes.

3 Q. That has not been completed on this form?

4 A. That's correct.

5 Q. Okay. And what is that box used for?

6 A. If you select in the upper area C -- if you
7 select a category that has a hazmat incident as
8 being the cause, then the software will direct you
9 to questions regarding those items. So because we
10 selected that it was an exterior structure -- or
11 exterior rubbish fire, it avoids those hazmat
12 questions, because it doesn't pertain to the
13 incident.

14 Q. All right. And I asked you this at the outset.
15 I'm going to ask you one more time just because you
16 may have found out something once you got there.
17 Did you ever determine what the actual cause or
18 starting point of this fire was?

19 A. Other than it being caused by a spark from --
20 from some sort of torch or welding that was being
21 performed.

22 Q. Okay. Thank you. Could you make this page
23 larger again, please, Lauren. And just for
24 completeness, would you go to the second page of
25 the exhibit, please.

1 And is it correct that the only entries on the
2 second page are way up at the top and then way down
3 at the bottom?

4 A. That's correct.

5 Q. And as far as there's no substantive
6 information on the second page?

7 A. That's correct.

8 Q. Would you go to the third page, please, Lauren.

9 And on the third page would it be correct that
10 the only entries are way at the top?

11 A. That's correct.

12 Q. And there's no substantive information on the
13 third page either?

14 A. There is something in Section D.

15 Q. D?

16 A. Yes.

17 Q. This area here?

18 A. Yes.

19 Q. Okay. Could you make that bigger, Lauren,
20 please.

21 Okay. And tell us, please, what -- what the
22 entry is there.

23 A. This area gets filled out as a summary of what
24 was put into the report from the upper pages. And
25 again it's very, very general due to the fact that

1 these are predetermined terms and they fall into
2 place when you make selections from the original
3 Category C.

4 Q. All right. And did you check the box for Item
5 Number 3?

6 A. Yes, I did.

7 Q. Okay. And that 3 says, "Item first ignited,"
8 and then it says "Flammable liquid gas in from
9 final container." And then a box is checked that
10 says, "Check if spread was confined to the object
11 of origin."

12 A. That's correct.

13 Q. What was your reason for checking that box?

14 A. That box was checked because there was no
15 spread. It was contained to the area that we were
16 fighting, was my definition of that.

17 Q. And that's the area you previously described
18 for us?

19 A. That's correct.

20 Q. You can take that down please, Lauren.

21 MR. PERSONIUS: May I have a minute,
22 please, Judge?

23 THE COURT: Certainly.

24 MR. PERSONIUS: Your Honor, those are all
25 the questions we have.

1 Thank you, Mr. Iannello.

2 THE WITNESS: You're welcome.

3 THE COURT: Okay. I may have missed this,
4 but, Mr. Iannello, did you take that video that you
5 testified about, or was that taken by somebody
6 else?

7 THE WITNESS: No, sir, I did not take that
8 video. I could give you an idea of where it did
9 originate from.

10 THE COURT: Okay. Just my question was,
11 you did not take it, right?

12 THE WITNESS: I did not.

13 THE COURT: Okay. Thank you.

14 Mr. Linsin, any questions?

15 MR. LINSIN: No questions. Thank you,
16 your Honor.

17 THE COURT: Okay. You're welcome.

18 Mr. Mango.

19 MR. MANGO: Thank you, your Honor.

20 CROSS-EXAMINATION BY MR. MANGO:

21 Q. Good morning, Mr. Iannello.

22 A. Good morning.

23 Q. How are you?

24 A. Very good. Thank you.

25 Q. We've -- we have met on a couple occasions, is

1 that correct?

2 A. Yes, sir.

3 Q. And again, my name is Aaron Mango. I'm an
4 assistant United States attorney.

5 And what I'd like to talk about is, obviously,
6 the fire incident that you responded to, okay,
7 Mr. Iannello?

8 A. Sure.

9 Q. When you arrived at the guard shack at the
10 Tonawanda Coke Corporation, is it fair to say that
11 the guard initially did not want to let you in?

12 A. That's correct.

13 Q. And when you arrived, while you were at the
14 guard shack and then as you proceeded into the
15 site, what you observed was dark, black smoke
16 billowing into the air, is that right?

17 A. Yes, I did.

18 Q. And when you arrived on scene, is it fair to
19 say that you observed some Tonawanda Coke employees
20 trying to take some corrective action to put that
21 fire out?

22 A. I can't say what their actions were, but there
23 were employees when I reached the scene.

24 Q. And at some point you had a conversation with
25 Mr. Walsh, I think you mentioned?

1 A. That's correct.

2 Q. And he's employed at the Tonawanda Coke
3 Corporation, are you aware of that?

4 A. I am.

5 Q. As a purchasing manager?

6 A. I don't know what his role was, but if that's
7 what you say.

8 Q. Okay. And is it fair to say that he told you
9 that the tanks were empty?

10 A. Yes.

11 Q. That the tank -- I should say the tank that
12 you've now looked at the pictures of, that tank was
13 empty.

14 A. That's correct.

15 Q. And then after you arrived on scene, other fire
16 personnel arrived on scene?

17 A. Yes.

18 Q. And it included six -- well, five other fire
19 departments other than yours and seven fire trucks
20 or fire equipment --

21 A. That's correct.

22 Q. -- in total.

23 All right. Lauren, if we could pull up
24 Government Exhibit 125.02, please?

25 THE CLERK: Is it in evidence?

1 MR. MANGO: Yes, in evidence.

2 BY MR. MANGO:

3 Q. Mr. Iannello, do you see this on your screen?

4 A. Yes.

5 Q. I don't think you were shown this exact
6 photograph during your direct testimony, but is it
7 fair to say that this tank in the middle of the
8 screen, this is the tank that you were fighting the
9 fire, that was the focus of your firefighting
10 activities?

11 A. Yes.

12 Q. All right.

13 A. That's correct.

14 Q. And do you see something poking out in the
15 left-hand side there? See where I put the arrow?

16 A. Yes.

17 Q. It looks almost like a tank? Did you make any
18 observations as to the tank in the background there
19 on the left?

20 A. Other than the pictures that I've seen, I had
21 no involvement or knowledge of that tank.

22 Q. Okay. And I want it to be very clear for
23 today's purposes, Mr. Iannello. I know you've met
24 with me several times --

25 A. Yes.

1 Q. -- along with the special agent. And you've
2 met with defense a couple of times, and we've all
3 probably showed you a number of photographs. So I
4 want your recollection today to be focused on what
5 you actually remember back in July of 2008.

6 So back -- sitting here today, do you recall in
7 July of 2008 any fire or activity relating to that
8 tank in the background on the left?

9 A. I don't recall any activity of that tank being
10 involved in our incident.

11 Q. Okay. I'd like to pull up Government
12 Exhibit 125.04 in evidence.

13 And, Mr. Iannello, you were shown this
14 photograph. And there's some area back here where
15 I put the arrow. Do you see that?

16 A. Yes.

17 Q. Okay. And is it fair to say that you did not
18 make any observations in the area where I put the
19 arrow?

20 A. That's correct.

21 Q. And would it also be fair to say that you don't
22 know whether Tonawanda Coke employees had actually
23 put out a fire in this area before you arrived?

24 A. That's correct. I have no knowledge.

25 Q. Okay. Now, looking at that scene, I'd like to

1 pull up -- you were shown Government
2 Exhibit 105.40, which is in evidence.

3 I'd like to pull that up, please, Lauren.

4 Now, you see the arrow. You put some dots on
5 the screen. I want to tell you, Mr. Iannello, this
6 is a photograph that the parties have now
7 stipulated was taken on April 21st of 2007. So
8 this would be well over a year before you
9 responded.

10 A. Okay. Thank you.

11 Q. Okay. So could you say whether or not -- see
12 that tank I've just put the box around -- whether
13 it was in that condition when you arrived or not?

14 A. I do not recall the conditions beyond that
15 point. I cannot answer that.

16 Q. Okay. And if we can now go back to Government
17 Exhibit 125.04 in evidence, which we just looked
18 at. Do you see that area back there where I put
19 the arrow? And again you testified you did not
20 make any observations in that area?

21 A. That's correct.

22 Q. Okay. And during your testimony, Mr. Iannello,
23 I think you said you did not -- for this tank here
24 where I just put the arrow, you did not observe any
25 material flow out of the tank, is that correct?

1 A. That's correct.

2 Q. All right. And so your observations of
3 material flowing would be limited to this tank on
4 the left where I put the arrow, is that correct?

5 A. Yes.

6 Q. I believe you testified that you were standing
7 about 30 to 40 feet away?

8 A. Correct.

9 Q. So that you were a safe distance from the fire?
10 Bless you.

11 So you were a safe distance from the fire?

12 A. Correct.

13 Q. Okay. And if we could pull up Government
14 Exhibit 125.03 in evidence, please.

15 Mr. Iannello, do you remember seeing this
16 during your direct testimony?

17 A. Yes.

18 Q. Okay. Would it be fair to say that when you
19 were on scene there was water used to put this fire
20 out?

21 A. That's correct.

22 Q. All right. And the water that was being
23 sprayed onto that tank was also being sprayed on
24 the ground. You mentioned there was some fire on
25 the ground?

1 A. That's correct.

2 Q. Okay. So -- so water from a fire hose was
3 being shot onto the ground in this area?

4 A. That's correct.

5 Q. And when you were on scene, do you recall
6 seeing the water create any type of pond or -- let
7 me leave it at that. Do you recall any type of
8 pond being created?

9 A. There were areas around the base of the large
10 tank that had water in it.

11 Q. Okay. So, if there was water on the ground and
12 material was leaking out of the tank from the base
13 of the tank actually below the waterline, you would
14 not have been able to see that, is that right?

15 A. That's correct.

16 Q. Now, you were asked a little bit about you got
17 no information that there was any type of hazardous
18 concern on-site here?

19 A. That's correct.

20 Q. Okay. If the material that -- well, let's --
21 let's actually -- I'd like to show that video
22 again, your Honor, if we can go to SSSS, please,
23 Sheila. And I'd like to -- if you can just enlarge
24 it half of the screen, just drag it from here. I
25 was able to do it. I don't know. If you just try

1 to drag from here and pull it that way. Yes.

2 Thank you. That's perfect.

3 Okay. So I'd like to try a third option, your
4 Honor, about halfway in between, if we can run it.

5 (The above-referenced video clip was
6 played for the jury.)

7 BY MR. MANGO:

8 Q. All right. Thank you.

9 So, Mr. Iannello, you were able to observe that
10 video on the screen?

11 A. Yes.

12 Q. If we could just go to the -- just the start,
13 and not play it, Sheila. Okay.

14 And I believe it was your testimony that there
15 was some firefighting activities occurring in this
16 area behind the tank, is that right?

17 A. No, sir. In that diagram where I put the two
18 circles I was more -- I was considering this area
19 here behind the shed.

20 Q. Okay. All right. But it's fair to say that
21 you see black smoke all around this tank, is that
22 right?

23 A. In this picture there's black smoke there, yes.
24 Correct.

25 Q. Okay. So would it be fair to say that maybe

1 there was not an actual flame, but something was
2 burning to cause this black smoke in and around
3 this tank back here, is that right?

4 A. My observation of this would be that the fire
5 and the smoke was being pushed against the tank and
6 it was finding a path around it. I would have no
7 knowledge if there was anything burning where
8 you've highlighted there, by the way I'm reading
9 the smoke.

10 Q. Okay. But -- and it's your testimony, though,
11 that you were standing about 30 to 40 feet in this
12 direction here?

13 A. Yes, correct. Right in that direction.

14 Q. Okay. Now, you talked about you were not aware
15 of whether the ground or the tanks or anything
16 contained any type of hazardous material, is that
17 right?

18 A. That's correct.

19 Q. Now, if you had known that the ground in this
20 area contained toxic levels of benzene, would that
21 have been something you would have wanted to know?

22 A. Yes.

23 MR. MANGO: Thank you, your Honor.

24 Nothing else.

25 THE COURT: Okay. Miss DiFilippo, you

1 have this up, right? No? Miss Henderson?

2 All right. Play it from the beginning on. I'm
3 just looking at the jurors, and it looked like they
4 wanted to go through it one more time. Start it
5 again, please. Thank you.

6 (The above-referenced video clip was
7 played for the jury.)

8 THE COURT: Okay. Thank you. Any
9 redirect, Mr. Personius?

10 MR. PERSONIUS: One question, Judge.

11 REDIRECT EXAMINATION BY MR. PERSONIUS:

12 Q. Mr. Iannello, based on being present at the
13 scene, based on seeing this video from the scene
14 again several times today, is there any question in
15 your mind as to where this fire was localized?

16 A. No. I'm pretty sure.

17 MR. PERSONIUS: No further questions,
18 Judge.

19 MR. MANGO: One brief follow-up, your
20 Honor.

21 RECROSS EXAMINATION BY MR. MANGO:

22 Q. Mr. Iannello, you never had a chance to go back
23 to the Tonawanda Coke?

24 A. That's correct. I have not been on the
25 facility since the fire.

1 Q. So if the fire had been in other areas, you
2 couldn't make that call, sitting here today?

3 A. No.

4 Q. Okay. Thank you.

5 MR. MANGO: Nothing else, your Honor.

6 THE COURT: Okay. Mr. Linsin, anything?

7 MR. LINSIN: Nothing. Thank you, your
8 Honor.

9 THE COURT: Okay. Mr. Iannello, you are
10 excused. Thank you.

11 THE WITNESS: Thank you.

12 THE COURT: Okay. From the defense
13 standpoint, anything additional?

14 MR. LINSIN: Save for the one issue
15 regarding that one chart, your Honor, Tonawanda
16 Coke does not have any additional witnesses to
17 present.

18 THE COURT: Okay. The defense then for
19 Tonawanda Coke rests subject to the resolve of the
20 exhibits?

21 MR. LINSIN: That is correct, your Honor.

22 THE COURT: Yes. Thank you.

23 Mr. Personius.

24 MR. PERSONIUS: Your Honor, the defense as
25 to Mark Kamholz rests.

1 THE COURT: Okay. Ladies and gentlemen,
2 we're going to take a 15-minute break. I'll bring
3 you back out here, and I'll give you the plan for
4 the day. Okay? Thank you very much. Keep your
5 minds open, please. The case is not concluded yet.

6 (Jury excused from the courtroom.)

7 THE COURT: All right. That's a little
8 fiat lux, right? I mean, for a little Latin flavor
9 to what we're doing?

10 Okay. I did speak with Miss Majerowski, I
11 think, in your observation, and the note that reads
12 Thursday, March 26th, was meant to read Tuesday,
13 March 26th, which is tomorrow. And she is willing
14 to come back, depending on our schedule, after the
15 doctor's visit and the sonogram and a few other
16 things that have to take place. So we're probably
17 talking about midday, you know, noonish.

18 So I'm just going to put that out there now,
19 and we can talk about it later so we can get
20 everything together.

21 Okay. Government has a rebuttal case?

22 MR. MANGO: Yes, your Honor. The
23 government asks permission to call Mr. Flax in
24 rebuttal. There were some issues that the
25 government believes is necessary to present a

1 rebuttal case on, that occurred during the
2 testimony of Miss Williams in defense, and it will
3 be brief. We would ask permission to call --
4 recall Mr. Flax to the witness stand.

5 THE COURT: Okay. And on the
6 representation that it relates to matters that are
7 directly connected to Miss Williams's expert
8 testimony, I will permit the rebuttal case. If it
9 doesn't relate to that, I'll entertain a motion to
10 strike.

11 But then there's time that was requested by the
12 defense with respect to Miss Williams's exhibit.

13 MR. LINSIN: Yes, your Honor. We -- we
14 will need some period of time to be able to run
15 back to the hotel and get these adjustments made in
16 this chart consistent with our discussion
17 previously today.

18 THE COURT: Well, what if we broke until
19 1:00 o'clock and then we put the government on.
20 I'll make this the jury's lunch break. And then
21 we'll go for as long as it takes, and then we'll
22 figure out what to do with the rest of the day and
23 tomorrow.

24 I'm somewhat inclined to do this. The charge
25 is long. We've got a few things to resolve. I'm

1 not overwhelmed by what I think timewise it's going
2 to take, because most of it seems to be breakdown
3 in terms of the counts of the indictment and some
4 add-ons. It's kind of a yea or a nay on what's
5 added or not. I don't think that will take
6 forever.

7 But the stock charge itself, that portion that
8 doesn't relate to the specifics of the counts and
9 the elemental aspects of it, I'm wondering if
10 you -- I'd like to break it up into the stock
11 portion of the charge and then the substantive --
12 what I'll call the substantive portion of the
13 charge. Because otherwise, to read it, it would
14 take a day, basically.

15 I wouldn't -- I mean, I would consider reading
16 the stock portion today, recessing -- this is after
17 the government's case -- for the morning tomorrow,
18 complete the substantive reading tomorrow
19 afternoon, and then have closing arguments and
20 deliberations start on Wednesday. Or, you know,
21 depending on how long it takes, I don't mind
22 starting the closing arguments tomorrow afternoon
23 if you're ready.

24 MR. LINSIN: Your Honor, this is not
25 something I've discussed with Mr. Personius. The

1 Court's proposal takes me a little by surprise.
2 But my experience has been that the summations,
3 closing arguments, are given prior to the Court's
4 charge to the jury. That would be my preference if
5 the Court is amenable to that procedure.

6 I don't know what the Court's normal practice
7 is. I'm cognizant of the difficulty in terms of
8 scheduling all of this, but we believe, especially
9 in a case like this where -- where there are some
10 significant legal issues that are unusual and that
11 we believe are important for the Court to -- for
12 the jurors to have in mind, that that clarification
13 be provided following summations rather than prior
14 to summations.

15 THE COURT: Well, I do it both ways, and a
16 lot of times it's -- frankly, it's scheduling
17 driven. And, you know, usually the charge that
18 relates to the substantive portion of the charge,
19 when I talk to the jury I'll -- you know, I tell
20 them that is the law that's going to apply. If you
21 hear anything different from the attorneys, you go
22 with what I give you, what you've heard, that kind
23 of thing. But, I mean, it works both ways.

24 If we were to follow your recommendation, what
25 we're really talking about, then, is closing

1 arguments, and the way we do it here is the
2 government proceeds first, followed by the
3 defendant, and then time to reserve for rebuttal.

4 Is the government ready to argue today?

5 MR. MANGO: No, your Honor.

6 MR. LINSIN: Your Honor, we had
7 anticipated -- perhaps it was -- we had anticipated
8 that -- that we would have a charge conference on a
9 number of these issues, we were expecting, at some
10 point this afternoon. I understand they are not
11 overwhelming, but the points that we had raised in
12 our submission yesterday we believe are very
13 important both to the charge itself and then to
14 shaping the arguments based on what we know the
15 charge is going to be. So clarification on those
16 issues would be important to us before being
17 prepared to -- to sum up.

18 MR. MANGO: Your Honor, just if I can
19 clarify my earlier -- preparation is a relative
20 term. I could, obviously, give a closing argument
21 if necessary today, you Honor. But in light of the
22 amount of preparation I'd like to do, I would ask
23 that -- and I actually think the Court's
24 recommendation makes sense in this case, so that
25 there's no lost time. And I would -- I would

1 presume that the Court is planning to give the jury
2 a copy of the charge? Is that --

3 THE COURT: I do at the end of the case,
4 but I don't tell them that until after the
5 completed charge, because I really want them to
6 focus on what I have to say.

7 MR. MANGO: Right. But I think that
8 would -- that would clarify or assist in resolving
9 if there were any legal issues or clarification
10 that needed to happen based on the -- the closings
11 by the attorneys. The jury would then have that as
12 a resource.

13 But I do agree that it would make sense in this
14 case to close and then let the jury start
15 deliberating, which -- which would best happen on
16 Wednesday.

17 THE COURT: Well, let me suggest something
18 else. Let me still suggest opening with the -- or
19 this afternoon, perhaps, delivering the stock
20 portion of the charge, I mean, that's going to take
21 a little bit of time as well. Have our charge
22 conference tomorrow morning when we're down, work
23 through everything, and then I can work on the
24 final part of the substantive charge following the
25 charge conference, and then we could have closing

1 arguments start in the afternoon tomorrow.

2 MR. PERSONIUS: And then, your Honor, do
3 the substantive part of the charge on Wednesday?

4 THE COURT: After the closing arguments.

5 MR. PERSONIUS: For whatever value it has,
6 I strongly prefer that as much of the charge as you
7 think is appropriate follow closing argument rather
8 than precede it.

9 THE COURT: Mr. Linsin.

10 MR. LINSIN: That is my preference. And
11 the only request I would make, your Honor -- I'm
12 not quite sure where the dividing line is for the
13 Court on the stock charge. I did have, in going
14 through this, a couple of comments I don't believe
15 in any way controversial or time-consuming, but I'd
16 just like the chance to review my notes, which I
17 have with me here, if we were going to proceed with
18 the stock charge this afternoon, just so that I
19 could confirm that there's nothing I didn't want to
20 raise in that regard.

21 THE COURT: Well, yeah. There will be
22 time for that. All right.

23 MR. LINSIN: Okay.

24 THE COURT: And, no, I didn't mean to
25 preclude any discussion, but, basically, I would

1 give the jury the first 53 pages as it's now
2 proposed, and that would be up to the discussion of
3 the Clean Air Act. That is where I consider the
4 charge to turn from stock to substantive.

5 MR. LINSIN: Okay.

6 MR. MANGO: Yes, your Honor.

7 We would just ask that if we do closings in the
8 afternoon, that all the closings happen in one
9 afternoon and not, you know, be broken up into --
10 into the day. I'm just concerned that we give our
11 closing and then they have the evening to weigh our
12 closing and then -- you know, based on time
13 constraints. So that would be my concern, if we're
14 going to do closing in an afternoon, we do -- you
15 know, if we need limited breaks. Obviously, I see
16 Michelle's face. I would just want all the
17 closings to occur in one period of time.

18 THE COURT: If we went over to the next
19 day for rebuttal, you wouldn't be opposed to that.

20 MR. MANGO: Well -- well, your Honor, I
21 would actually prefer it happen all in one day,
22 actually.

23 THE COURT: All right. How -- you've --
24 probably you're semi-ready to argue. But
25 approximately how long?

1 MR. MANGO: I'm putting it at about an
2 hour, your Honor.

3 THE COURT: All right. Okay. Mr. Linsin,
4 do you have an idea?

5 MR. LINSIN: Yes. I feel I need to limit
6 myself to 45 minutes, your Honor, and I think I can
7 do that.

8 THE COURT: Okay. And Mr. Personius?

9 MR. PERSONIUS: My hope is, Judge, about a
10 half an hour.

11 THE COURT: All right. I don't see any
12 problem then, if we start at, say, noon, all right.
13 Because I'll tell the jury to become -- to come
14 here fortified, so -- which means they can intake
15 lunch before they get here. We'll start somewhere
16 around noonish. That will give everybody time to
17 adequately argue their respective cases, we'll have
18 times for breaks, and then, depending on what time
19 it is, we can either complete or start the
20 substantive charge or start on Wednesday with
21 the -- what I call the substantive charge,
22 beginning with the Clean Air Act and whatever we
23 decide after tomorrow's charge conference. And
24 then we'd start the deliberations on Wednesday.
25 And I take a little bit of time. You know,

1 I -- right now, the charge, as you know, is a
2 little over 115 pages or so. But I will -- bless
3 you -- I will walk the jury through the Clean Air
4 Act and the elements, and then we try to take a
5 couple of breaks, and I just don't want them to
6 become in their own minds overwhelmed by
7 everything.

8 I mean, you'll see a sigh of relief -- I'm sure
9 you all experience this -- when I tell them they
10 get the charge in written form. But, you know,
11 I'll work with them as if they're going to get it
12 only orally, and until that time when we break the
13 news that they get the written version.

14 If I see that they're really panicking or at
15 least I sense that, I may tell them, "I'll give you
16 the written charge, but just stay focused with what
17 I'm doing." We'll see how that works. Okay?

18 That's my intention. If you have any problem
19 with that, let me know, and I'll reconsider. But
20 that's basically the way I like to proceed.

21 MR. LINSIN: We agree that makes perfect
22 sense, your Honor.

23 THE COURT: Okay.

24 MR. PERSONIUS: We're comfortable with
25 that, Judge. Thank you.

1 MR. MANGO: Likewise with the government.

2 THE COURT: Okay. We ate up about ten
3 minutes, so let's have the jury come back about
4 1:15 then, and then we'll start with the
5 government's case, and then I'll tell the jury that
6 I will be giving them a part of -- of the
7 instruction this afternoon. And then we'll break.
8 It shouldn't -- they should probably get an early
9 break today. And then we'll start as we discussed
10 tomorrow morning. Okay.

11 MR. PERSONIUS: Judge, if we could,
12 please, factor in to what you're planning for today
13 an opportunity, which I think will be brief, to
14 raise just a couple of issues with you about your
15 standard charge. They're not controversial, but I
16 think it will be quick.

17 THE COURT: Okay. No, that's fine. And
18 if we get them here at 1:15, we'll begin with the
19 government's redirect case, we will finish that up,
20 we'll break, we'll talk about whatever you think is
21 appropriate as far as the standard or stock charge,
22 and then we'll go from there.

23 MR. PERSONIUS: Thank you.

24 THE COURT: Okay. I'm going call the jury
25 back now, and we'll give them the break, and I'll

1 explain to them what they face for the day. And
2 I'm going to mention tomorrow, too, because they
3 should know that tomorrow they won't start until
4 noon, or hopefully as close to noon as we can get
5 Miss Majerowski back.

6 (Jury seated.)

7 THE COURT: Okay. Welcome back, and I'm
8 going give you what we usually call the home
9 stretch lecture. So have a seat.

10 Okay. Jury is back, roll call waived. The
11 attorneys and parties are back present.

12 Here's where we are, ladies and gentlemen.
13 We're going to send you out for an early lunch, and
14 we're going to try to resume about 1:15, okay. At
15 that time -- as you know, the defense has rested
16 its case. They do not intend to call any
17 additional witnesses or produce any additional
18 evidence. The government gets the opportunity to
19 call a rebuttal witness. They have one witness
20 that I understand is reasonably short. That will
21 take place this afternoon on your return from
22 lunch.

23 After that we're going to take a break, and
24 when we resume I will start what we call the
25 preliminary instruction to you with respect to the

1 deliberation charge, which will include some
2 general instructions and definitions and the like,
3 and then eventually we get to giving you the
4 specifics on the law and the definitions to be
5 applied.

6 Some of the terms that we talk about, like
7 burden of proof and presumption of innocence and
8 proof beyond a reasonable doubt, I'll talk about
9 those with you this afternoon. I'm going to break
10 it up a little bit, because there's a fairly
11 lengthy charge or instruction in the law that comes
12 with the case and which I need to give you before
13 you can actually begin your deliberations. So you
14 get that.

15 Tomorrow we will resume at approximately
16 12:00 o'clock. And in part -- I think you probably
17 know Miss Majerowski has a doctor's appointment,
18 and when she gets back we're going to start. And
19 at noon or thereabouts we will have the closing
20 arguments. And you will hear from the attorneys.
21 They will give you their closing arguments. We
22 hope to complete all three of them in -- tomorrow
23 afternoon.

24 There then remains a part of the instruction in
25 the law that I still have to give to you, and I

1 will complete that with you. And once that's
2 complete, then you will begin your deliberations,
3 and we'll get you all set up for that.

4 So that's what you have to look forward to, you
5 know, so we're talking Wednesday morning by the
6 time we either start deliberations or complete the
7 charge on the law to you. Okay. You'll be down
8 tomorrow morning, and then, you know, the real
9 business begins where we get down to deciding this
10 case with a unanimous verdict on the 19 counts of
11 this indictment.

12 So we're almost there, but we've got to keep
13 your minds open. No discussion, no research, no
14 anything. And then you come back, and once you
15 start your deliberations, you know, that's when you
16 will be asked to designate or elect your foreperson
17 if you choose to do it that way. And that person
18 will preside over your deliberations, and I'll give
19 you the instructions on how to conduct those in
20 summary fashion, but it's basically what, common
21 sense, experience intelligence.

22 You'll get the exhibits. You'll have those to
23 review. And we'll do whatever we can to assist you
24 so that you can get to that unanimous verdict in
25 this case, because, obviously, nobody knows this

1 case like all of you. And you've been terrific in
2 that regard.

3 You'll get to see us here for the duration of
4 whatever time it takes, although Mr. Glasner, Ariel
5 Glasner, who's here, and you know who he is, he's
6 sitting up against the wall, he has a personal
7 matter that he will be attending to for a few days,
8 so he will not be here, but I think everybody else
9 will.

10 And that's where we're at. So, you know, we're
11 relying on you to resolve the case as you stated at
12 the time that we started that you would make your
13 very best effort to do that unanimously in this
14 case.

15 So that we can get everything together and get
16 ready, you get an early lunch. We'll see you back
17 here at what time? Did I cover everything or --
18 yes? Okay. Okay. So we will see you at 1:15, and
19 have a good lunch. Beautiful day. And be anxious
20 to get back here. Thank you.

21 (Jury excused from the courtroom.)

22 THE COURT: Okay. 1:15.

23 MR. LINSIN: Thank you, your Honor.

24 MR. MANGO: Yes, your Honor.

25 (Lunch recess was taken.)

1 (Jury not present in the courtroom.)

2 THE COURT: Okay. The attorneys and
3 parties are back present. The jury is back. We're
4 ready to call them in. But how are we doing in
5 terms of the exhibit? Mr. Linsin.

6 MR. LINSIN: Your Honor, we have revised
7 the exhibit in accordance with a -- the discussion
8 this morning, but also in accordance with a draft
9 transcript of Miss Williams' testimony regarding
10 this fuel issue. That entry now regarding fuel
11 reads as follows: "Used to make a fuel or used as
12 a fuel unless that fuel is a nonwaste fuel."

13 And we believe that -- it's not literally --
14 some of it is verbatim, some of it is -- is a
15 condensing of several different answers, but we
16 believe that accomplishes the objective. We've
17 made it a neutral background, and the heading now
18 reads "Marcia Williams' opinions regarding what
19 materials are regulated as waste under RCRA in this
20 case."

21 THE COURT: Okay. Let me -- can I take a
22 look at it? Miss Henderson, would you publish
23 that, please?

24 Okay. Mr. Mango.

25 MR. MANGO: Your Honor, my concern -- and

1 I defer to the Court, obviously, but my concern is
2 now we're making substantive changes into the white
3 box, when -- I mean, the whole -- part of the
4 rebuttal case is to -- was to point out that there
5 was some clear errors in the white box. You know,
6 not necessarily the testimony, but the white box.
7 So now we've got an exhibit that is in a much
8 different form than what the jury saw it
9 originally.

10 I mean, obviously, that is consistent with what
11 she testified though. I have reviewed this partial
12 transcript. So, you know, I just point it out that
13 it seems like now the jury is going to get this
14 version of this chart that they're not going to be
15 familiar with. I mean, we'll still be prepared.
16 We still have enough on rebuttal to talk about.
17 That's the only point I make.

18 THE COURT: Okay. All right. What I will
19 do -- and I do think it's clearly helpful. I don't
20 think that the jury will be misled by the
21 fine-tuning of this particular exhibit. And I am
22 going to permit it under 611.

23 I guess -- is that over objection?

24 MR. MANGO: No, your Honor.

25 THE COURT: Okay. All right. And

1 correspondingly, then, the government's exhibit --
2 do you have a number for it?

3 MR. MANGO: Yes, your Honor. 212. And at
4 the lunch break I added a sharper version of that,
5 and I gave it to Miss Labuzzetta, which is right
6 there. So --

7 THE COURT: Okay. And you agree,
8 Mr. Linsin, that it's a sharper version of 212?

9 MR. LINSIN: It is a sharper version. The
10 only point I made, it is a -- I understand there
11 may be space issues, but for purposes of
12 clarification with the jury, I understand Mr. Flax
13 would be testifying about this, but much as we have
14 designated our exhibit as reflecting Marcia
15 Williams' opinions, I think it would be helpful if
16 this exhibit somewhere indicated that these reflect
17 Mr. Flax's opinions. That was the only request I
18 had made of the government, and I believe it's
19 reasonably parallel.

20 THE COURT: Can you do that?

21 MR. MANGO: Your Honor, I think it's going
22 to be obviously clear from the testimony that this
23 is -- these are his opinions. I just hesitate,
24 one, based on space, and, two, it took some working
25 to try to get it into the sharper format, to be

1 ready to present here this afternoon.

2 Maybe we can just see how the testimony comes
3 in and see if it is very clear, based on the
4 testimony, that these are his opinions as to, you
5 know, the RCRA issues in play in this case. I
6 think the testimony then would stand for itself.

7 THE COURT: Okay. I mean, I'll let you
8 work with it. If we can entitle it his opinions
9 before the exhibit goes to the jury, I think that
10 would be acceptable. Mr. Linsin?

11 MR. LINSIN: That fine, your Honor. No
12 problem.

13 MR. PERSONIUS: And, your Honor, I think
14 what could be done, if it can't be done -- we're so
15 used to doing things these days with computers and
16 things -- somebody with good penmanship, in the
17 white at the top could simply handwrite in there
18 with a Magic marker that is Mr. Flax's opinion.

19 THE COURT: Or, you know, we could -- we
20 could put a -- a label on it. But we'll give that
21 some thought. But, you know, it does limp a little
22 bit just because it doesn't have some title
23 designation to it. So -- but 212 will be received
24 into evidence. There's no objection, I understand.

25 MR. LINSIN: No objection, your Honor.

1 THE COURT: Okay. I mean, it is -- I hope
2 it is clarifying or helpful. There is a lot on
3 there, but it is sharp, so we'll leave it at that.
4 And as I mentioned, I will receive 0000 into
5 evidence, and there's no objection.

6 So, okay. Substantial progress. I think we
7 can then call the jury back and start with your
8 rebuttal case witness.

9 MR. MANGO: Yes, your Honor.

10 THE COURT: Okay. Please, Chris.

11 MR. LINSIN: Thank you.

12 (Jury seated.)

13 THE COURT: Welcome back, ladies and
14 gentlemen. Please have a seat.

15 Okay. I think against the backdrop of the
16 explanation that I gave you before you broke for
17 the early lunch, thank you very much for coming
18 back here timely. We are ready to proceed. The
19 attorneys and parties are back present. You are
20 here, of course, roll call waived.

21 The defense case is finished. They believe
22 that you have everything you need now to decide the
23 case for the defendants. The government believes
24 that it has given you sufficient proof beyond a
25 reasonable doubt to establish their case against

1 the defendants, but the government does in this
2 scenario get the opportunity to present a rebuttal
3 case, so to speak, if it complies with the rules,
4 and I found that it did. So there is one more
5 witness, not a -- we think, not a long witness.
6 And the government is ready to do that.

7 Once that is complete, then I'll give you
8 further instructions on how we're going to go
9 forward.

10 Mr. Mango, you have another witness?

11 MR. MANGO: Yes, your Honor. In rebuttal
12 the government would call Phil Flax.

13 THE COURT: Okay. Now, you have heard
14 from Mr. Flax before, but in this scenario he
15 amounts to witness number 30 by my count, so --

16 All right. We're going to have you stand right
17 about there, Mr. Flax. Thank you.

18 P H I L I P F L A X, having been duly sworn as a
19 witness, testified as follows:

20 THE COURT: Okay. I think you know the
21 drill, but, again, you now are under oath. You've
22 testified before. You have been here in the
23 courtroom. I'm going to ask you now to state your
24 full name, spell your last name, please.

25 THE WITNESS: My name is Philip Flax,

1 F-L-A-X.

2 THE COURT: Okay. Mr. Mango, your
3 witness.

4 MR. MANGO: Thank you, your Honor.

5 DIRECT EXAMINATION BY MR. MANGO:

6 Q. Good afternoon, Mr. Flax.

7 A. Good afternoon, sir.

8 MR. MANGO: Your Honor, based on
9 Mr. Flax's earlier testimony in this trial
10 regarding his background, his education, his
11 knowledge of RCRA and its implementing regulations,
12 I ask that Mr. Flax continue to be viewed as an
13 expert in that area, and I again offer him to the
14 Court as an expert in a way to streamline this
15 rebuttal case.

16 THE COURT: All right. And his testimony
17 really is going to be directed, as I understand it,
18 to the testimony of the defense expert, Marcia
19 Williams.

20 MR. MANGO: That's correct, your Honor.

21 THE COURT: Okay. Unless there's an
22 objection, I'm going to proffer Mr. Flax once again
23 as the government's expert as articulated, but
24 primarily in RCRA.

25 MR. LINSIN: No objection, your Honor.

1 MR. PERSONIUS: No objection. Thank you,
2 Judge.

3 THE COURT: Okay. Ladies and gentlemen,
4 remember that -- and you've heard and seen Mr. Flax
5 before -- expert witnesses -- and you will have an
6 opportunity to ask questions if you will -- or
7 choose to, because he is being entered as an
8 expert. You assess his believability, his
9 credibility, just as you would any other witness on
10 the same criteria factors. But keep in mind he has
11 a special knowledge and expertise based on study,
12 experience, work history and the like, in
13 particularly the RCRA statute. So -- and
14 procedures.

15 Go ahead, Mr. Mango.

16 MR. MANGO: Thank you, your Honor.

17 BY MR. MANGO:

18 Q. Mr. Flax, did you have an opportunity to listen
19 to the testimony of Miss Williams?

20 A. Yes, I did.

21 Q. And were there any parts of that testimony that
22 you agreed with?

23 A. Some.

24 Q. Okay. Were there any parts of that testimony
25 you that you did not agree with?

1 A. Yes, there were.

2 Q. Okay. I'd like to start with some items you
3 may have agreed with. Did you hear her testimony
4 regarding spills and leakage?

5 A. Yes, I did.

6 Q. All right. Was there any portion of that
7 testimony that you agreed with?

8 A. Yes, there was.

9 Q. Okay. Tell the jury what that was.

10 A. I agreed that inadvertent spills and leakage
11 were those spills that were done by personnel,
12 accidental spills when they were taking every
13 precaution to try to prevent those spills, and
14 those types of spills are immediately cleaned up
15 and any residual contamination is removed.

16 Q. All right. Are you familiar with Tonawanda
17 Coke's practice of placing K087 waste onto the coal
18 piles on the ground?

19 A. Yes, I am.

20 Q. All right. And as a result of that practice,
21 would you characterize any releases containing K087
22 waste as an inadvertent activity?

23 A. No, I would not.

24 Q. Okay. Tell the jury why.

25 A. I wouldn't because I believe that, in my

1 opinion, the practice of taking K087 tar sludge and
2 placing it on coal in the coal piles on the grounds
3 was a deliberate action that allowed for the
4 uncontained, uncontrolled, and unremediated release
5 of contamination to the environment.

6 Q. All right. Mr. Flax, did you hear
7 Miss Williams's testimony regarding the purposes of
8 RCRA?

9 A. Yes, I did.

10 Q. All right. And what is your understanding of
11 the purposes of RCRA?

12 A. The purpose of RCRA are twofold. The first is
13 to protect human health in the environment through
14 the proper management of hazardous waste. And the
15 second is resource recovery and conservation; in
16 other words, reuse, recycling, and the reduction of
17 wastes.

18 Q. All right. Can you tell the jury whether any
19 of those -- if one of those purposes takes
20 precedence over the other?

21 A. Yes, of course. The protection of human health
22 in the environment takes precedence over everything
23 else. All other considerations are secondary.

24 Q. All right. During Miss Williams's testimony
25 did you have an opportunity to observe the chart

1 she used during her testimony, which is Defendant's
2 OOOO?

3 A. Yes, I did.

4 Q. And have you had a chance to review Defendant's
5 OOOO before now testifying here today?

6 A. Yes, I did.

7 MR. MANGO: Your Honor, I'd like to pull
8 up Defendant's OOOO at this point.

9 THE COURT: Okay. Mr. Mango, go ahead,
10 please. There's no objection? Yes.

11 MR. LINSIN: No objection, your Honor.
12 And is this an appropriate time to resolve its
13 admission, the matter I had understood, at least on
14 the record last week, was still open?

15 MR. MANGO: No objection now, your Honor.
16 I understand the Court is inclined to admit this
17 into evidence, and we have no objection.

18 THE COURT: All right. It is now received
19 into evidence, and it may be considered by you,
20 ladies and gentlemen. It has been designated the
21 summary chart, if you will, of the opinions of the
22 defense expert, Marcia Williams, with respect to,
23 as designated, waste under RCRA in this case. So,
24 you know, you are to view it as that, for purposes
25 of assisting you in understanding the evidence

1 that's relevant to the RCRA counts in the
2 indictment no this case. So this is now an exhibit
3 received into evidence, and it may be published for
4 your review.

5 (Defendants' Exhibit 0000 was received
6 into evidence.)

7 MR. MANGO: Thank you, your Honor.

8 BY MR. MANGO:

9 Q. Mr. Flax, do you see that Defendant's 0000 on
10 the screen?

11 A. Yes, I do.

12 Q. All right. How would you characterize -- do
13 you see the white box in the middle of the exhibit?

14 A. Yes, sir.

15 Q. How would you characterize the information
16 contained in this white box?

17 A. Well, it's incomplete in some respects, and
18 it's missing at least one critical factor that, in
19 my opinion, needs to be taken into account when you
20 consider whether material recycled is a solid
21 waste.

22 Q. Okay. I want you to tell the jury -- this
23 critical factor you believe is missing here, why
24 don't you tell the jury a little bit more about
25 that.

1 A. The section of the regulations for recycling
2 materials that states, "Materials are solid waste
3 when recycled when they are applied to or placed on
4 the land -- on the land in a manner that
5 constitutes disposal." And that is entirely
6 missing from the white box in this figure.

7 THE COURT: Where should that go, in your
8 opinion?

9 THE WITNESS: That should go right on top
10 of "used on the land," sir.

11 THE COURT: Thank you.

12 BY MR. MANGO:

13 Q. Okay. So that is -- that is missing in this
14 white box?

15 A. Yes, it is.

16 Q. Now, in a manner -- I think you mentioned,
17 "applied to or placed on the land in a manner
18 constituting disposal."

19 A. That's correct.

20 Q. In your understanding of disposal under RCRA,
21 can you tell the jury what that is?

22 A. Disposal under RCRA is the placement of solid
23 waste, hazardous waste, or hazardous materials onto
24 or into the land in a manner that allows the
25 release of that solid waste, hazardous waste, or

1 hazardous constituents, which are basically the
2 chemicals that make something hazardous, into the
3 environment.

4 Q. Okay. So for disposal purposes, is that the
5 key, that the material may enter the environment?

6 A. Correct.

7 Q. Okay. Now, in light of -- I think you also
8 mentioned that you believe this was incomplete. In
9 light of your belief that Defendant's 0000 is
10 incomplete, did you prepare any charts of your own
11 for use today?

12 A. Yes, I did.

13 Q. All right. And what type of chart -- if you
14 could tell the jury, what type of chart did you
15 prepare?

16 A. I prepared a chart that, in my opinion, tries
17 to demonstrate the steps one would take to
18 determine whether something is a solid and a
19 hazardous waste. I've limited the information to
20 the things that I believe are applicable to the
21 situation at Tonawanda Coke, and then I've made
22 three little decision trees to try and show how
23 that information is applicable to the RCRA counts
24 that are contained in the criminal indictments.

25 MR. MANGO: All right. At this point,

1 your Honor, I'd like to show the witness Government
2 Exhibit 212. And based on our earlier conversation
3 and understanding the Court's ruling, I would move
4 this into evidence.

5 THE COURT: Yeah. There's no objection,
6 is my understanding. It will bear with it probably
7 a descriptive title when you next see this
8 particular exhibit, ladies and gentlemen. But it
9 will be received. No objection, Mr. Linsin?

10 MR. LINSIN: No objection, your Honor.

11 THE COURT: All right. Mr. Personius?

12 MR. PERSONIUS: No objection, Judge.

13 THE COURT: Okay. And it may be
14 published. And the RCRA counts in this indictment
15 are 17, 18 and 19.

16 MR. MANGO: Yes, your Honor.

17 THE COURT: Okay.

18 (Government's Exhibit 212 was received
19 into evidence.)

20 MR. MANGO: Yes, it is published. Great.

21 BY MR. MANGO:

22 Q. Mr. Flax, do you see this document, now
23 Government Exhibit 212 in evidence, on your screen?

24 A. Yes, I do.

25 Q. Okay. Why did you create this chart?

1 A. I created this chart to try to explain to the
2 jury in as simple a way I could how you determine
3 whether materials from Tonawanda Coke are solid
4 waste and how that relates to the counts in the
5 indictment.

6 Q. Okay. Is it your belief that this chart will
7 aid the jury in understanding the RCRA concepts
8 relating to Counts 17, 18 and 19?

9 A. I certainly hope so.

10 Q. All right. Now, let's start with the box in
11 the upper left, which says "Definition of solid
12 waste, number 1." Can you describe for the jury,
13 using reference to that box -- and if you need to
14 touch the screen, please do so, add dots. Describe
15 for the jury how a material becomes a solid waste.

16 A. According to what I have in this box, materials
17 become a solid waste when they are discarded by
18 being either abandoned or recycled in certain ways.

19 Q. All right. And abandoned -- you have two
20 bullet points underneath abandoned?

21 A. Yes.

22 Q. Could you talk about that briefly?

23 A. Well, abandoned by being disposed or by being
24 accumulated, stored, or treated in lieu of or -- in
25 lieu of being abandoned.

1 Q. Okay. Now, "Recycled in certain ways based on
2 the type of material." You have three bullet
3 points there?

4 A. Yes.

5 Q. Can you talk a little bit more about the bullet
6 points you included under this recycling part?

7 A. Right. Well, the first is "Applied to or
8 placed on the land in a manner that constitutes
9 disposal." That's what we just talked about when
10 things are applied to the land in a manner so that
11 contamination can enter the environment.

12 The second, I put that down just to show,
13 because when I was listening to Miss Williams's
14 testimony, she gave an example of something that's
15 used to -- used on the land. I think what she
16 meant to say was used to produce a product that is
17 used on the land, if I'm not incorrect, because she
18 used the example of a fertilizer. And this is the
19 section of the regulation that applies to that.

20 The other, "Used to produce a fuel," using that
21 because I believe that is -- directly pertains to
22 the situation at Tonawanda Coke.

23 Q. All right. And we'll talk about that in a
24 minute in more detail.

25 Now, you've -- just if you could just briefly

1 walk the jury through the other two boxes on the
2 right-hand top part of this page.

3 A. Sure. Box number 2 contains the exclusion from
4 being a solid waste that is specific to wastes from
5 the coking processes. There are about 25 of these
6 specific exclusions in the regulations. This is
7 the only one that applies to waste products from
8 coking operations.

9 Q. And then underneath it there's a box number 3.
10 What is that?

11 A. Right. After you determine if something is a
12 solid waste, then you have to determine whether
13 it's a hazardous waste. And, of course, you do it
14 in two ways, and I condensed this, because they
15 could be separate. You do it first by trying to
16 identify it as a listed waste. And listed waste,
17 as I know you've heard a hundred times, are those
18 things that are specifically identified in the
19 regulations. They each have numbers associated
20 with them. Or you determine if that waste exhibits
21 a characteristic, like ignitability, corrosivity,
22 reactivity or, in this case, toxicity.

23 Q. All right. And just describe in general terms
24 the bottom half of this exhibit, what -- what that
25 contains.

1 A. Well, I produced the decision tree that --
2 where you'd follow along to see if something was a
3 solid waste and then a hazardous waste and then
4 subject to regulation, trying to make it as simple
5 to possible. It's a way to use the information in
6 the three upper boxes to make a decision about the
7 nature of the material and the RCRA requirements
8 involved.

9 Q. Okay. All right. Let's start with Count 17
10 here. What is your understanding of Count 17 of
11 the indictment?

12 A. My understanding of Count 17 is that it alleges
13 storage of hazardous waste on the ground in the
14 area around the two Barrett tanks. Storage without
15 a permit.

16 Q. All right. And now you've got your decision
17 tree here. Why don't we walk through that, if we
18 could.

19 A. Sure. The first box you look at is, "Is the
20 material on the ground a solid waste?" So you go
21 to box number 1, and there is a stipulation that
22 the Court and -- all the parties and the Court have
23 agreed, that that material was abandoned. So you
24 go no further. Since that material was abandoned,
25 you follow the yes arrow down, because now you know

1 it is a solid waste, and you look and you try to
2 determine is it a hazardous waste.

3 Q. And take the jury through the next step of your
4 decision tree.

5 A. In determining whether or not the material is a
6 hazardous waste, I reviewed analytical data from
7 September and December of 2009 that was taken of
8 this material, and I found that the samples
9 indicated that this material was a toxic hazardous
10 waste because it exceeded the regulatory level for
11 benzene. So, yes, it is a hazardous waste.

12 The next step is to determine if the material
13 was actively managed. In 1998 Tonawanda Coke
14 applied coke breeze to these piles around the
15 Barrett tanks. In my mind, that was enough to make
16 this material actively managed. Therefore, what's
17 happening is you have a hazardous waste in an area
18 that's being actively managed. That activity
19 requires a RCRA storage permit, and Tonawanda Coke
20 did not have one.

21 Q. Okay. All right. Let's go through Count 18.
22 What is your understanding of Count 18 of the
23 indictment?

24 A. Count 18 involves the removal of waste from the
25 Barrett tanks and its mixing -- dumping and mixing

1 with coal on the ground. And the allegation is
2 that that activity required a RCRA disposal permit.
3 Q. All right. So let's walk through the decision
4 tree you created for that.

5 A. Well, the first thing you do is you try to --
6 you go to box number 1, and you see and try to
7 decide if this material is a solid waste. And you
8 look and you see that, first of all, the material
9 is not abandoned, because it's being recycled. And
10 then you look in "recycled in certain ways," and
11 you see if something applies to that. And, in my
12 opinion, two things do apply, but the most -- the
13 first one, "applied to or placed on the land in a
14 manner that constitutes disposal," in my opinion,
15 that applies to this material. But also the third
16 one, it was used to produce a fuel. So there's two
17 criteria there to indicate to me that this material
18 is a solid waste.

19 Then the next step, you look at box number 2,
20 because some solid wastes have specific --
21 waste-specific exclusions. So if you handle it in
22 a certain way, it comes out of the solid waste
23 field. The exclusion for coke waste reads, K087 --
24 and it's paraphrased a little bit -- "K087 and D018
25 from coke by-products processes are excluded from

1 the definition of solid waste when recycled to coke
2 ovens."

3 And here's the big point: "Conditioned on
4 there being no land disposal" -- "no land disposal
5 from the point they are generated to the point they
6 are recycled to the coke ovens."

7 Now, it is my opinion that the mixing of the
8 decanter tank tar sludge and the mixing of the
9 materials taken out of the Barrett tanks on the
10 coal on the ground constituted land disposal, and a
11 definition of which is going to be supplied to you
12 by the Court.

13 That opinion differs very much, and it's the
14 main point -- there is a lot of points where I
15 differ from Miss Williams's testimony. This is the
16 main point where I differ from Miss Williams. I
17 believe that this material is subject to full
18 regulation. Otherwise, why would you need the
19 second part of this regulation that says
20 "conditioned on there be no land disposal from the
21 point it is generated to the point where it's
22 actually introduced back into the coke ovens"?
23 Wouldn't be necessary.

24 I believe the mixing procedure utilized at
25 Tonawanda Coke makes any eligibility for this

1 exclusion null and void. The material is subject
2 to full regulation. And being that it is, the next
3 step I take in this little decision tree is to see
4 if it's a hazardous waste.

5 Well, once again, this material, there were
6 samples taken in September and December of 2009,
7 and those samples indicate that it was toxic for
8 benzene. Therefore, that material is a hazardous
9 waste.

10 Q. Okay. And as a result of that, what is your
11 opinion --

12 A. The land disposal -- the disposal -- excuse
13 me -- the disposal of hazardous waste as alleged in
14 the indictment requires a permit, a permit under
15 RCRA, and Tonawanda Coke Corporation had no such
16 permit.

17 THE COURT: Are we talking K087?

18 THE WITNESS: No. Right now, your Honor,
19 I'm talking D018 that was taken out of the Barrett
20 tanks.

21 THE COURT: Okay.

22 MR. MANGO: That's Count 18, your Honor.

23 BY MR. MANGO:

24 Q. Okay. Let's talk now about -- let me go back.
25 In that description of your decision tree for

1 Count 18, I'm going to put a little point there.

2 You said "used to produce a fuel." Is it your
3 opinion that coke is a fuel?

4 A. It's my opinion, based on everything I've
5 heard, yes.

6 Q. Okay. All right. Can you tell the jury what
7 your understanding of Count 19 is? Just your
8 understanding.

9 A. Count 19 alleges legal disposal -- well, excuse
10 me. It alleges disposal of hazardous waste without
11 a permit as related to the practice at Tonawanda
12 Coke of removing K087 from the tank and applying it
13 with coal on the grounds.

14 Q. Okay. This is the K087 waste into the tar box,
15 is that right?

16 A. Yes.

17 Q. And brought to the coalfield?

18 A. Yes.

19 Q. Okay. Walk the jury through maybe a similar
20 analysis to the earlier count, but if so, just --
21 you don't need to repeat yourself, but walk the
22 jury through the decision tree for Count 19.

23 A. Sure. The first step, once again you go to box
24 number 1, materials not being abandoned, is being
25 recycled in a certain way. And it is, in my

1 opinion, being used to produce a fuel and applied
2 to or placed on the land. So, in my opinion, this
3 material is a solid waste.

4 Then you go to box number 2, and the same
5 argument. This is an exclusion, a specific
6 exclusion for these wastes. And if this material
7 had not been mixed on the land, it -- it would be
8 eligible for the exclusion. However, the fact that
9 they did mix this material on the land with the
10 coal makes them ineligible for this exclusion.

11 Therefore, I go to the next box, and I ask
12 myself, is this hazardous waste? K087 is a
13 hazardous waste, a listed hazardous waste under
14 RCRA. So, therefore, the disposal of this material
15 requires a permit under RCRA, and Tonawanda Coke
16 had no such permit.

17 Q. All right. Thank you, Mr. Flax. Did you hear
18 Miss Williams's testimony regarding land-based
19 production units?

20 A. Yes, I did.

21 Q. All right. Have you become familiar with what
22 land-based production units are?

23 A. Well, I did try to make myself familiar with
24 them, because I really had never heard the term
25 before. So I did a little research, yes.

1 Q. Have you done a fair amount of research since
2 you've last testified?

3 A. Yes, I have.

4 Q. All right. What is your understanding of what
5 a land-based production unit is?

6 A. The land-based production units that are
7 recognized by EPA are restricted to the example
8 that Miss Williams gave on the stand, and that is
9 gold heap leaching and copper dump leaching. And
10 these are production activities that take place
11 right on the land and are limited to the mining
12 industry. And EPA has elected not to regulate
13 those activities because -- well, they don't occur
14 around here -- because they felt that the state
15 authorities in Nevada, where it does occur, are
16 sufficient to handle any problems that might result
17 from that. And they also felt that any necessary
18 cleanup or any other means necessary to address any
19 contamination resulting from the operation of these
20 types of units could be performed under either the
21 Clean Water Act or the Safe Drinking Water Act.
22 That's why they elected not to regulate them under
23 RCRA.

24 Q. Okay. So it's your testimony land-based
25 production units apply only to something that is

1 physically and actually produced on the land?

2 A. Yes. That is the only way to do this very
3 restricted type of operation.

4 Q. Do you believe that the concept of land-based
5 production units has any relevance to Count 18 or
6 19 of this indictment?

7 A. None whatsoever, in my opinion.

8 Q. And tell the jury why.

9 A. Well, because coke is produced in a coke oven.

10 Q. Did you hear Miss Williams's testimony
11 regarding a continuous production process?

12 A. Yes, I did.

13 Q. And is there any definition of "continuous
14 production process" in the RCRA regulations?

15 A. No, there is not.

16 Q. All right. What is your understanding of what
17 a continuous production process is under RCRA?

18 A. A continuous production process under RCRA is a
19 situation where you would take the waste from the
20 point where it is generated and immediately, in a
21 safe manner, transport it back to be introduced
22 right into the production process. No storage, no
23 other activity in between that. That is my
24 understanding.

25 Q. And what do you -- or I'm sorry. Do you

1 believe that the concept of continuous production
2 process has any relevance to Count 18 or Count 19
3 of this indictment?

4 A. None whatsoever, in my opinion.

5 Q. Okay. Tell the jury why.

6 A. Because the operations conducted at Tonawanda
7 Coke were not continuous in nature. Material was
8 either taken from -- the K087 was either taken from
9 the tar tank or the material was taken from the
10 Barrett tanks, and it wasn't immediately
11 reintroduced into the coke ovens. It was mixed
12 with coal on the ground in the coalfields. There
13 was no way in the world that this is a continuous
14 production process.

15 MR. MANGO: Thank you, Mr. Flax.

16 Nothing further, your Honor.

17 THE COURT: Okay, Mr. Mango. Thank you.

18 Mr. Linsin.

19 MR. LINSIN: May I proceed, your Honor?

20 THE COURT: You may proceed.

21 CROSS-EXAMINATION BY MR. LINSIN:

22 Q. Good afternoon, Mr. Flax.

23 A. Good afternoon, sir.

24 Q. We've not spoken since you testified last, is
25 that correct?

1 A. That is correct.

2 Q. Mr. Flax, you've changed a number of the
3 opinions you expressed since you last testified
4 here, haven't you?

5 A. I don't believe that's true, no.

6 Q. Do you recall when you testified here, if I
7 have it correctly, on Thursday, March the 14th, and
8 you were asked some questions about the K087
9 material, that you testified that because this was
10 a listed hazardous waste under RCRA, there was no
11 need to be concerned at all or to analyze at all
12 whether it was a solid waste? Do you recall
13 testifying that way?

14 A. Yeah.

15 Q. All right. But now in the decision tree you
16 have provided on this Government Exhibit
17 number 212, you now concede, I guess, that it is
18 important and necessary that you first determine
19 whether that material is a solid waste, is that
20 correct?

21 A. What I believe is that the uninitiated or the
22 unexperienced need to go through this procedure.

23 Q. The un -- isn't -- isn't it explicitly required
24 in the regulations -- not just for the uninitiated
25 or the inexperienced, isn't it explicitly required

1 in the regulations, the hazardous waste regulations
2 under RCRA, that you first determine whether the
3 material is a solid waste?

4 A. That is a procedure that is specified in the
5 regulations. But when I or one of my inspectors go
6 out to a facility and we inquire of the facility
7 the materials that they generate, or we familiarize
8 ourselves with the types of waste, beforehand, that
9 a facility generates, I think we've got a jump
10 start on how we view the process.

11 Q. Let me ask the question again. You may have a
12 jump start, and your experience may well help you
13 in the analysis, but isn't it true that before you
14 reach any decisions about whether material or
15 activity regarding material requires a permit, you
16 must first determine whether it is a solid waste
17 under RCRA? Isn't that correct?

18 A. Something has to be a solid waste to be a
19 hazardous waste. If that's what you mean, yes.

20 Q. And when you testified here just 11 days ago,
21 you said that you didn't have to be concerned about
22 whether K087 was a solid waste, because it's a
23 listed hazardous waste, and you go straight to that
24 analysis. Isn't that what you said?

25 A. That's what I would do, sir, yes.

1 Q. But you've now modified that so we can
2 incorporate this important decision-making process
3 on your chart, correct?

4 A. I've modified this chart to try to explain in
5 the most simple way to the jury how you could come
6 about the conclusions that I have come to.

7 Q. And the way you now have this provided, at
8 least the decisions are consistent with actually
9 what is required under the regulations, correct?

10 A. These are the decisions I would have come to if
11 I didn't start at the point that you are
12 indicating.

13 Q. You also testified last time, did you not, that
14 you thought there was one disposal count charged in
15 this case, correct?

16 A. At the time you were asking me questions about
17 one particular situation, and my testimony at that
18 time was regarding that explicit event. Yes.

19 Q. Well, Mr. Flax, didn't you testify that it was
20 your understanding that there was one disposal
21 count charged in this case that related to K087?

22 A. Yes. I was not familiar with the indictment.
23 That's correct.

24 Q. All right. You have testified, as I heard you,
25 repeatedly, that one of the fundamental differences

1 that you have with Miss Williams's testimony is
2 that you believe that the mixture of this, either
3 the K087 or the D018, on the coal piles, in your
4 testimony, on the ground, constituted land
5 disposal, is that correct?

6 A. Correct.

7 Q. Since you last testified, have you done
8 anything to inform yourself about what the material
9 was that was beneath these coal piles out at
10 Tonawanda Coke?

11 A. I've listened to whatever testimony I sat in
12 the courtroom and heard what individuals had to say
13 about it. Yes.

14 Q. Did you hear what Gerry Priamo had to say --
15 not had to say. Did you hear what Gerry Priamo
16 testified was underneath these coal piles?

17 A. No. I was not in the courtroom for that.

18 Q. Has anyone advised you that Mr. Priamo, who had
19 substantial experience in this coalfield, testified
20 that the coal underneath these coal piles was
21 anywhere from 3 to 6 feet deep? Did you hear that?

22 A. I wasn't aware of it, but that's fine. Okay.
23 Now I am. Yes.

24 Q. All right. And you agree with me, don't you,
25 that coal -- at least for the purposes of coking

1 operations, coal is a raw material, correct?

2 A. Absolutely.

3 Q. And raw materials are not regulated under RCRA,
4 correct?

5 A. That's correct.

6 Q. All right. So you testified multiple times
7 that -- in your direct testimony a moment ago, that
8 this mixing operation occurred on coal piles that
9 were on the ground. That was not correct, was it?

10 A. That is correct.

11 Q. Are you disputing Mr. Priamo's testimony about
12 what was beneath these coal piles?

13 A. No.

14 Q. But you're equating 3 to 6 feet of coal with
15 the ground. Is that what I understand?

16 A. Yes, I am.

17 Q. All right. Even though raw material is
18 excluded from RCRA?

19 A. Yes, I am.

20 Q. Okay. You testified that you believe that this
21 recycling procedure, both for the K087 and the
22 D018, constituted land disposal, in your opinion,
23 correct?

24 A. That is correct.

25 Q. And you believe that that was true because it

1 allowed for, if I took it down correctly, the
2 uncontained, uncontrolled releases into the
3 environment. Is that your testimony?

4 A. Exactly. Yes.

5 Q. Are you aware of any sampling that was done in
6 the coalfields at Tonawanda Coke?

7 A. No, I'm not.

8 Q. Are you aware of the fact that Tonawanda Coke
9 has a Clean Water Act permit?

10 A. No, I'm not.

11 Q. Are you aware of what the testing parameters
12 are on a monthly basis under that facility's Clean
13 Water Act permit?

14 A. No.

15 Q. Do you have any information at all to indicate
16 or have you heard any testimony to indicate that
17 there was at any point releases of coal tar sludge
18 or D018 material into the environment?

19 A. I have heard testimony and I've read testimony
20 that indicated that no preventative precautions
21 were ever taken to prevent that.

22 Q. Did you ever hear the testimony -- let's start
23 at the beginning of the process, with the material
24 that was taken out of the tar box. Did you hear
25 the testimony from people who had observed that

1 process, about how long those front-end loaders sat
2 there so that all that material that was outside of
3 the bucket would drip back into the box before the
4 front-end loader traveled to the coalfield?

5 A. No. No. No, I haven't.

6 Q. Would you believe that would have been
7 important for you to understand?

8 A. No, I don't.

9 Q. Would you agree with me that that is a prudent
10 and valuable precaution to take to make sure that
11 none of this material just dribbles onto the
12 ground?

13 A. Could you explain the process that relates to
14 this again, in terms of the front loader?

15 Q. Sure. I'm sorry if I my question wasn't clear.
16 I'm talking about whether you ever heard testimony
17 from anyone or whether anyone ever advised you that
18 when this material was removed from the tar box,
19 scooped out of the tar box, that the front-end
20 loader would actually sit there and idle in front
21 of the tar box so that any of the material that
22 might be on the outside of the bucket would drip
23 back into the tar box before the front-end loader
24 actually moved to travel to the coalfield.

25 A. Well, that's very nice, but I'm more concerned

1 with what happens when the front-end loader goes to
2 the coalfields and dumps the tar.

3 Q. We'll get there. But my question is, first of
4 all, did you hear that testimony?

5 A. No, I did not.

6 Q. You were not aware of those facts?

7 A. No, sir.

8 Q. All right. And have you read or seen any
9 descriptions of what actually happened when this
10 material was mixed with the coal on the coal piles?

11 A. Yes, I have.

12 Q. Whose testimony have you read?

13 A. I have -- I don't remember whose, but I did
14 read some short sections that dealt with that.

15 Q. You don't remember any names?

16 A. I -- I read several people's testimony. I
17 could give you the names of the people's testimony
18 I read. If it's in there, that's where I saw it.

19 Q. Well, what I'm trying to understand right now,
20 Mr. Flax, is what is the basis, the factual basis,
21 for the opinions you're now offering. What is your
22 factual basis for your understanding of what
23 actually happened in this recycling process?

24 A. That there was no preventative measures, no
25 containment or control of this coal tar when it was

1 dumped on and mixed with the coal on the ground.

2 Q. You mean it was not performed within a box?

3 A. It was not performed in a manner to prevent the
4 uncontrolled release of contamination.

5 Q. And my question -- my initial question before
6 we got off on this track was whether you are aware
7 of any testimony anywhere, from any person, that
8 says that any of this material was released into
9 the environment.

10 A. I believe I saw some testimony from either
11 Mr. Rogers or Mr. Hoffmann that indicated that no
12 preventative controls were put in place and nobody
13 ever told them to avoid doing anything that would
14 cause a release of this material when it was
15 applied to the coal.

16 Q. Right. And that's now the second time you've
17 given that answer. I'm going to repeat my question
18 for the third time. Are you aware of any evidence,
19 any testimony from any source, that any of this
20 material did enter the environment?

21 A. You mean from somebody who was standing there
22 watching it? No, I'm not.

23 Q. From any source, sir.

24 A. No. No.

25 Q. You offered some testimony on Count 17 today.

1 I want to go back through that briefly, but am I
2 correct that you also now have become more familiar
3 with what the allegations are in Count 17 of the
4 indictment since you last testified?

5 A. Yes, sir.

6 Q. And you're aware that in the indictment,
7 anyhow, it's alleged that this storage went back to
8 1998 when coke breeze was first spread on this
9 material, is that correct?

10 A. That is my understanding, yes.

11 Q. And it's your opinion that spreading of the
12 coke breeze constituted active management and
13 therefore this material became subject to RCRA, is
14 that correct?

15 A. That's part of what determined my opinion, yes.

16 Q. But you also testified that you read the -- or
17 were aware of the stipulation that before Tonawanda
18 Coke took possession of this property that the
19 material in the tanks and on the ground around the
20 tanks had been abandoned by a prior owner, correct?

21 A. Correct.

22 Q. So let's just look at your decision tree, as
23 you described, it for Count 17. You indicate here
24 that the first question you have to ask is whether
25 the material is a solid waste. Isn't it true that

1 because this material that relates to Count 17 had
2 been abandoned by a prior owner, don't you -- isn't
3 the first question you have to ask whether or not
4 the material was actively managed, in order to
5 determine whether it becomes subject to RCRA?
6 Isn't that your first question?

7 A. You could back into it that way, yes.

8 Q. Isn't that the threshold question, Mr. Flax, to
9 determine whether the material becomes subject to
10 RCRA regulation?

11 A. I believe there is a definition of active
12 management that has been agreed upon, and it's been
13 proffered by this Court. And I don't believe it
14 says that in the definition, sir.

15 Q. Well, there is a definition of active
16 management, and we can get to that in a moment.
17 But my question, though, really relates to how that
18 concept of active management relates to waste that
19 had been abandoned before the enactment of RCRA.
20 Are we agreed that material that was abandoned
21 before the enactment of RCRA is not subject to RCRA
22 regulation unless and until it is actively managed?

23 A. I agree with that, yes.

24 Q. All right. So given that there is a
25 stipulation in this case about that material, that

1 it had been abandoned by a prior owner prior to
2 '78, isn't it correct that the first question you
3 have to ask in order to understand whether the
4 material is subject to RCRA regulation -- don't you
5 have to first ask is the material or has it been
6 actively managed?

7 A. That is what you need to ask to know if a
8 permit was required. It's not what you have to ask
9 to determine whether the material is a solid or
10 hazardous waste.

11 Q. So you believe it's subject to RCRA regulation
12 even if it wasn't actively managed?

13 A. No. I believe it to be a hazardous waste if it
14 wasn't actively managed, but I believe that it is
15 subject to a permit because it was actively
16 managed.

17 Q. You heard Miss Williams testify about a wide
18 number of -- of facilities she's familiar with -- a
19 large number of facilities she is familiar with, in
20 which previously abandoned waste has been paved
21 over or parking lots or even buildings put over
22 them. Did you hear that testimony, sir?

23 A. Yes, I did.

24 Q. Are you familiar with those kinds of management
25 of inactive waste storage units?

1 A. We routinely pave over areas where soil has
2 been contaminated by hazardous waste or hazardous
3 constituents, because there is a structural
4 stability. So we pave over it because the paving
5 does two things. It puts a barrier between that
6 contamination and people and the environment, and
7 it also prevents the infiltration of precipitation
8 that can drive that contamination elsewhere. But I
9 certainly wouldn't want my daughter parking her car
10 in a parking lot that is paved over a sludge
11 impoundment, and I would not want to live in a
12 building that had been built upon a basis of
13 sludge, sir, because I don't believe there's any
14 structural integrity to it.

15 Q. I'm going to ask you, Mr. Flax, if you could
16 confine your responses to answers that are
17 responsive to my question.

18 A. I'm sorry. I just thought I was trying to
19 explain myself.

20 Q. My question is whether you are familiar with
21 circumstances where, consistent with RCRA
22 regulations, inactive waste management units of
23 material that existed pre-RCRA have been paved over
24 or even had buildings built over them.

25 A. Yes. Under the conditions that I just spoke

1 about.

2 Q. So you are familiar with those?

3 A. Yes.

4 Q. All right. And are you familiar with the
5 testimony that was provided by Mr. Gerry Priamo and
6 others in this case that the purpose of spreading
7 this breeze over the material that's on the ground
8 was to harden the surface?

9 A. I have not heard Mr. Priamo's testimony, sir.

10 Q. Would you agree with me that that purpose is
11 consistent with the overpavement that I had just
12 described of these other inactive waste management
13 units?

14 A. No.

15 Q. The spreading of the coke breeze on this
16 material that was on the ground, in your
17 understanding of the facts, was that the only
18 activity that, in your opinion, constituted active
19 management of this material?

20 A. Well, what I read in Mr. Rogers' testimony,
21 sir, and Mr. Hoffmann's, apparently there had been
22 problems walking in the area because of the sludge,
23 and apparently heavy equipment had gotten stuck in
24 the sludge. So the coke breeze was added, it's my
25 understanding, to that material in order to try to

1 avoid that situation.

2 Q. To permit heavy equipment to get close to the
3 tanks, is that correct?

4 A. Yes.

5 Q. All right. So, that is the activity that you
6 believe constitutes active management?

7 A. Yes, because that activity caused the waste in
8 place to be disrupted and disturbed, and it
9 actually caused it to migrate down gradient,
10 according to what I've read, closer to the tanks.
11 And I believe that is consistent with the
12 definition of active management that has been
13 developed by the Court.

14 Q. Would you agree with me, or does it fit with
15 your understanding that the definition of active
16 management that will govern the decisions in this
17 case reads as follows: "Physically disturbing
18 accumulated wastes within a management unit or
19 disposing of additional hazardous waste in existing
20 units containing previously disposed wastes,"
21 period. "In other words, it means taking some
22 action to disturb or disrupt contained hazardous
23 waste or adding hazardous waste to previously
24 contained material."

25 Is that your understanding of the operative

1 definition?

2 A. Yes, it is.

3 Q. And so it requires an action taken to disturb
4 or disrupt?

5 A. Correct.

6 Q. And it's your view that the spreading of coke
7 breeze on this tar to facilitate the access of
8 heavy equipment to the tanks was an action taken to
9 disturb or disrupt?

10 A. It was an action taken that did disturb and
11 disrupt the waste in place.

12 Q. And -- but that isn't what I just read, is it?

13 A. I don't know if that's exactly what you just
14 read.

15 Q. All right. You testified at a couple of
16 points, I presume with regard to Counts 18 -- and
17 it would be applicable to Counts 18 and 19, that
18 you believe that coke is -- qualifies as a fuel
19 under the terms used in the RCRA definition of
20 solid waste, is that correct?

21 A. That's correct.

22 Q. All right. And if I heard you correctly, you
23 said that you believed coke is a fuel, based on
24 everything you've heard?

25 A. Heard and read, yes.

1 Q. And what is the basis of that opinion, sir?

2 A. In part, decisions that have been made
3 interpret -- regulatory interpretations that have
4 been made by EPA in regard to when coke, intended
5 to be recycling, becomes a solid waste.

6 Q. Isn't it true, Mr. Flax, that EPA expressly has
7 made the determination that coke is not a
8 waste-derived fuel? Isn't that what EPA decided?

9 A. That is true. That has nothing to do with
10 this.

11 Q. If -- if a material is determined to be a fuel
12 under the solid waste definition, what is the
13 consequence under this regulation?

14 A. If something is recycled and in doing so is
15 used to produce a fuel, then when it is -- it is --
16 it is -- it is a solid waste.

17 Q. What is a solid waste?

18 A. The material used to produce a fuel in this
19 case is the tar sludge.

20 Q. All right. Let me ask you if this is not
21 consistent with your understanding of the actual
22 language of the regulation. And I'm referencing,
23 for the record, 216.2(c)(2)(B). And these are all
24 materials that are -- that fit within the
25 definition of solid waste under the regulations.

1 "Materials are solid waste when they are used
2 to produce a fuel or are otherwise contained in
3 fuels," parentheses, "in which case the fuel itself
4 remains a solid waste," close parentheses, period.

5 A. That relates to the part of that that says
6 "contained in fuels," not to the part that says
7 "used to produce fuels."

8 Q. And what is the factual basis for your
9 understanding that coke is a fuel?

10 A. Once again, it deals with every regulatory
11 interpretation that any -- any policy or guidance
12 documents that I have ever been associated with at
13 my time in EPA.

14 Q. And can you point to any RCRA regulation that
15 identifies coke as a fuel?

16 A. RCRA regulation does not identify raw
17 ingredients, sir. It doesn't deal with raw
18 ingredients. I think we covered that. It deals
19 with wastes.

20 Q. So RCRA doesn't define coke as a fuel?

21 A. No. In the RCRA regulations coke is not
22 defined as a fuel.

23 Q. But you said, based on everything you've heard,
24 you've concluded coke is a fuel.

25 A. Yes. And I said it was based on all the

1 regulatory interpretations, policy, and guidance
2 that I have ever been associated with in all my
3 years at EPA.

4 Q. Is it fair, Mr. Flax, to summarize your
5 disagreement with Miss Williams as follows: That
6 you believe -- at least with respect to the D018
7 and K087 material, it's your opinion that the
8 mixing of this material on the coal piles
9 constituted land disposal?

10 A. That's a fair representation, yes.

11 Q. And you heard Miss Williams testify that for a
12 number of reasons she believed that it didn't
13 constitute land disposal, is that correct?

14 A. I disagree with her. Yes.

15 Q. And we are also in agreement, if I'm correct,
16 that the regulations that talk about this process,
17 both the solid waste definition and this -- the
18 language of this exemption, neither of those
19 specify that the recycling must occur on a specific
20 pad or in a specific container or under specific
21 conditions, is that a fair statement?

22 A. That is correct. What the regulation does, it
23 attempts to prevent releases to the environment,
24 yes.

25 Q. It says that there should not be intervening

1 land disposal, correct?

2 A. There should be no land disposal.

3 Q. From the time of generation until it is
4 recycled to the ovens, correct?

5 A. Correct.

6 Q. And your interpretation of that limitation is
7 that this recycling process did not comply with
8 that restriction?

9 A. Correct.

10 Q. And Miss Williams's view was that it did?

11 A. Correct.

12 MR. LINSIN: I have nothing further, your
13 Honor. Thank you.

14 THE COURT: Okay, Mr. Linsin. Thank you.
15 Mr. Personius.

16 MR. PERSONIUS: I have no questions,
17 Judge.

18 THE COURT: Okay.

19 MR. MANGO: I have two, your Honor.

20 THE COURT: Okay, Mr. Mango.

21 MR. MANGO: Thank you.

22 THE COURT: Sure.

23 REDIRECT EXAMINATION BY MR. MANGO:

24 Q. Mr. Flax, in your position -- again
25 incorporating your earlier testimony -- in your

1 position as head of the RCRA program for Region 2
2 of EPA, would you in any realm of the possibility
3 authorize the paving over of the area around the
4 Barrett tanks and allow the building on top of
5 those areas after pavement is put down?

6 A. In the condition in which I understood the area
7 was, in no way would I authorize that.

8 Q. Okay. Are you aware of any type of guidance
9 letter authored by Miss Williams involving the
10 Toledo Coke Corporation, which determined --

11 MR. LINSIN: Objection, your Honor.

12 MR. MANGO: Your Honor, if I can get the
13 whole question out --

14 THE COURT: No. Let's hear it over here
15 first.

16 (Side bar discussion held on the record.)

17 MR. MANGO: Thank you, your Honor.

18 Miss Williams has authored a guidance letter in
19 response to a question that came in from the Toledo
20 Coke Corporation, which says that K087 waste is --
21 the coal tar sludge is used to produce a fuel.
22 That's directly relevant to the question that was
23 brought up on cross-examination. He's aware of
24 that, and I think it's fair to ask him. He was
25 questioned as to his knowledge of coke being a fuel

1 and what is used to produce a fuel.

2 THE COURT: When was this letter, and what
3 did it relate to? Was it an investigation? Was it
4 a court proceeding?

5 MR. MANGO: Your Honor, it was a letter
6 that came to EPA when Miss Williams was head of the
7 Office of Solid Waste, and she responded by giving
8 the opinion of what the Office of Solid Waste is.

9 THE COURT: When was that?

10 MR. MANGO: I believe, 1988.

11 MR. LINSIN: Your Honor, the opinion
12 letters -- and this is as to Miss Williams or
13 anybody else -- issued by EPA are in response to a
14 specific set of circumstances posed by a question.
15 They are fact specific. They are not viewed by the
16 agency as precedential. This is three or four
17 steps below a policy statement, and I think it is a
18 distortion and a misuse out of context of documents
19 that counsel knows are sui generis.

20 THE COURT: Well, I don't know what the
21 context is, which makes it problematic. I mean,
22 this is a question that better should have been
23 asked to Miss Williams rather than this witness.
24 His knowledge of it, I think, tends to be more
25 confusing, I mean, in the overall picture of

1 things. I'm going to deny the request to ask that
2 question.

3 MR. LINSIN: Thank you.

4 MR. MANGO: Yes, sir.

5 (End of side bar discussion.)

6 THE COURT: Okay. Objection sustained.

7 BY MR. MANGO:

8 Q. Mr. Flax, you testified on cross that in all of
9 the regulatory opinions you've observed you believe
10 coke is a fuel?

11 A. That's correct.

12 MR. MANGO: All right. Thank you, your
13 Honor. Nothing else.

14 MR. LINSIN: No further questions, your
15 Honor. Thank you.

16 MR. PERSONIUS: Nothing. Thank you,
17 Judge.

18 THE COURT: Okay. Mr. Flax, you are
19 excused. Thank you very much.

20 MR. MANGO: Your Honor, I would say
21 subject to any questions by the jury.

22 THE COURT: Ladies and gentlemen, I feel
23 terrible. All right. Are there any questions?

24 Chris, I think we're going to need your
25 assistance on this, please.

1 Okay. Thank you very much. This is a record
2 number of, at least, pieces of paper containing
3 questions.

4 Okay. Let's put you on a little white noise.
5 Let me work this through with the attorneys, and
6 then we'll go forward.

7 You want to take a break? We'll have you back
8 here in 15 minutes.

9 MR. LINSIN: Would it be possible to make
10 copies so we can read them?

11 THE COURT: Yes, absolutely.

12 (Jury excused from the courtroom.)

13 THE COURT: All right. Mr. Flax, you can
14 step down.

15 THE WITNESS: Thank you, your Honor.

16 THE COURT: Don't leave.

17 We'll have Mr. Flax outside while we discuss
18 and resolve. But I will make copies of the
19 questions for you.

20 MR. MANGO: Thank you, your Honor.

21 THE COURT: You're welcome. We'll see you
22 in a few minutes.

23 (Short recess was taken.)

24 (Jury not present in the courtroom.)

25 MR. LINSIN: My apologies, your Honor.

1 THE COURT: Oh, no, not at all.

2 All right. Let's try to work through a couple
3 of questions. I think your staped accumulation
4 starts with Juror number 6's question?

5 MR. MANGO: Yes, your Honor.

6 THE COURT: Okay. And that's
7 Miss Majerowski's question, actually. And the
8 question is: "According to RCRA, what would a
9 company have to do if they purchased a facility
10 with abandoned tanks from the previous owners on
11 their land after RCRA was in effect, if they didn't
12 actively manage these abandoned tanks?"

13 Fair question.

14 MR. LINSIN: No problem with that
15 question, your Honor.

16 THE COURT: Interesting question.

17 MR. MANGO: It was.

18 THE COURT: You agree?

19 MR. MANGO: Yes. Fair question, your
20 Honor. And the second part, "What would RCRA do
21 then if the company did just that?" I would make
22 sure that gets in there as well. But, yes, fair
23 question.

24 THE COURT: Well --

25 MR. LINSIN: I don't know what the second

1 part means. That's my problem.

2 THE COURT: Yeah.

3 MR. LINSIN: I don't know what the "did
4 just that" means.

5 THE COURT: I'm not sure "what RCRA would
6 do," either. I don't know what that means. What
7 do you think that means?

8 MR. MANGO: I think it means if they
9 didn't actively manage, that is, I believe, what
10 she's referring to as "did just that," which would
11 be did not actively manage, what would RCRA do.
12 It's really just a -- trying to restate the
13 question. So, actually, I'm comfortable if you
14 want to leave that part out, your Honor.

15 THE COURT: Okay. All right. Let's --
16 and I will. I'll delete that, because I don't
17 think I can interpret what that means, and I think
18 we run a risk if we ask her what that means. And I
19 think the first question is a good question.

20 Okay. The first question from Steven Bauman,
21 Juror number 7, is at the bottom of the page: Does
22 the 3.4 feet -- 3 to 4 feet I think it is -- of
23 COD.

24 MR. LINSIN: Coal. It looks like cod, but
25 I think it's coal in the coalfield.

1 MR. PERSONIUS: Oh, yes. Coal in the
2 coalfield.

3 THE COURT: Yes. Okay. That's probably
4 regulated by the Clean Water Act. All right.

5 -- of coal in the coalfield make any difference
6 in regards to land disposal or have any effect on
7 runoff because of rain?

8 MR. MANGO: Fair question.

9 THE COURT: Okay, Mr. Personius?

10 MR. PERSONIUS: Yes, I agree, Judge.

11 THE COURT: Okay. Okay. And fair
12 question next, I think: "Has anyone actually
13 determined the depth of coal by means of a core
14 sample, et cetera?"

15 I'll permit that.

16 MR. MANGO: I don't think he'll know the
17 answer.

18 THE COURT: Anybody object to that
19 question?

20 MR. MANGO: No.

21 MR. LINSIN: No, your Honor.

22 THE COURT: Now we go to Mr. Collins's
23 question, I think, which is Juror number 3: "Do
24 you know if the mixing of K087 is done on a pad or
25 back in the coalfields?"

1 MR. MANGO: It seems like a strange
2 question, because I think he testified that what
3 his understanding of the -- Count 19 of the
4 indictment would be, which is the mixing of the
5 K087 waste on the coal piles on the ground. But
6 I'm comfortable with it being asked. I don't
7 think -- I really don't see the point of it, but --

8 MR. LINSIN: I agree it is a -- it is
9 difficult to understand the point of it, and this
10 witness, especially in his rebuttal testimony, has
11 testified only about an operation that occurred on
12 the coal piles.

13 THE COURT: Well, the question -- yeah,
14 the more I think about it, do you know. I think
15 that's what he wants to know from this witness. If
16 he knows. Right?

17 MR. MANGO: Yeah. Is that --

18 MR. PERSONIUS: That could be.

19 MR. LINSIN: Okay.

20 THE COURT: I think that's okay.

21 MR. LINSIN: All right.

22 THE COURT: I think it's just background.

23 MR. PERSONIUS: Would it be appropriate,
24 your Honor, to change the "is" to a "was"?
25 Because, I mean, what's being done presently, I

1 mean, literally, what's being done now, it is being
2 done on a pad. So maybe consider changing that to
3 "was"?

4 THE COURT: Yeah, I think that's right. I
5 think that --

6 MR. MANGO: Well, maybe that was the point
7 of the question, actually. If we're having trouble
8 interpreting the question, that could very well be
9 what Mr. Collins is trying to get at is what is
10 being done now.

11 THE COURT: Well, that's not relevant.

12 MR. LINSIN: That's right.

13 THE COURT: I'll ask it only as "was," and
14 if it triggers some sort of reaction from him, then
15 we'll hold it at that, and I'll explain to him that
16 phrasing it in any other way would make it
17 irrelevant.

18 All right. I think this is Mrs. Funderburk's
19 question, number 5: "Under RCRA, in your opinion,
20 would the runoff of tar sludge and coal from the
21 coal piles into the ditches be considered as
22 hazardous waste?"

23 MR. MANGO: That's a good question.

24 MR. LINSIN: No problem with this
25 question, your Honor. With the intro under RCRA?

1 THE COURT: Yes. It will, yes. Under
2 RCRA.

3 MR. LINSIN: All right. Okay.

4 THE COURT: Okay. And Miss Russ's
5 question, number 10: "Coal is a raw material and
6 therefore is unregulated, but when the coal is
7 mixed with K087 or D018, is that mixture an
8 unregulated raw material? Why or why not?"

9 MR. LINSIN: Fair question, your Honor.

10 MR. PERSONIUS: I think that's a great
11 question.

12 MR. MANGO: Likewise. It's a good
13 question.

14 THE COURT: Okay.

15 MR. PERSONIUS: Got the numbers down too,
16 Judge. That's scary.

17 THE COURT: I know. I know. It's
18 amazing. Okay. All right. Everybody in
19 agreement?

20 MR. LINSIN: Yes.

21 MR. PERSONIUS: Yes. Thank you, Judge.

22 MR. MANGO: Yes.

23 THE COURT: Okay. Chris, would you ask
24 the jury if they want to come back out?

25 COURT SECURITY OFFICER: Sure will.

1 THE COURT: Okay. Thank you.

2 MR. PERSONIUS: Judge, do you want to have
3 Mr. Linsin ask these again or not?

4 THE COURT: No. Don't ask that question.
5 Okay.

6 (Jury seated.)

7 THE COURT: You know, ladies and
8 gentlemen, I don't know how you do it. I have
9 fewer objections to your questions than when the
10 attorneys ask questions. How can that be?

11 Have a seat, please.

12 Okay. And for not asking you about your
13 questions, I get put in the penalty box all day
14 tomorrow. All right. So, we will begin, and, you
15 know, this is really serious business, and again on
16 behalf of everybody we thank you for all the
17 efforts that you're making to really be engaged in
18 this process, because, you know, very shortly
19 you're going to be in a position where we're going
20 to ask you to return that unanimous verdict.

21 So each of your questions I am going to ask.
22 And thank you for those, and I ask everybody to pay
23 close attention. And Mr. Flax remains under oath,
24 and these questions will be directed to him in no
25 particular order. They happened to leave the order

1 that I arranged them, and Miss Labuzzetta
2 photocopied them in another order, so we're going
3 to go with her order, and then I'll pay the price
4 later on for saying that.

5 But we're going start with Miss Majerowski's
6 question, Mr. Flax. And remember you are under
7 oath, and ask you to be as directly responsive as
8 you can. Here's your first question:

9 According to RCRA, what would a company have to
10 do if they purchased a facility with abandoned
11 tanks from the previous owners on their land after
12 RCRA was in effect, if they didn't, quote, actively
13 manage, close quote, these abandoned tanks?
14 Question mark.

15 Do you understand the question?

16 THE WITNESS: Yes, I do, your Honor.

17 THE COURT: Okay.

18 THE WITNESS: First let me say that
19 management in tanks is storage and is always
20 considered active management. It would be the
21 responsibility of the new owners to determine what
22 is in those tanks and to handle that material
23 appropriately.

24 When tanks like these are, you know, on a
25 property and the ownership of the tanks crosses the

1 dates of RCRA implementation, there is still a
2 responsibility. Responsibility doesn't go away
3 when a facility changes ownership. There are still
4 those tanks, and the contents in those tanks needs
5 to be addressed. And if it is regulated under
6 RCRA, it has to be managed.

7 If tanks on a facility that are left there by a
8 previous owner and they're there when a new owner
9 takes possession of the property, if those tanks
10 contained gold or diamonds, there would be no
11 shortage of people taking responsibility for what's
12 in those tanks.

13 THE COURT: So your answer is that under
14 RCRA the new owners would have to determine what is
15 in those tanks?

16 THE WITNESS: We would hope that as the
17 facility changed ownership, your Honor, that there
18 would be discussion between the previous owner and
19 the new owner as to what the nature of the material
20 is in the tanks, so it could be handled properly.
21 If that wasn't the case, then it's the
22 responsibility of the new owner of the property to
23 know whether or not they are storing hazardous
24 waste in those tanks.

25 THE COURT: All right. Storing hazardous

1 wastes that are solids, and then they would have to
2 actively manage, is that your testimony?

3 THE WITNESS: Storage -- storage, by
4 definition, your Honor, is active management.

5 THE COURT: Okay. That's the answer to
6 your question. Okay? Okay.

7 A JUROR: Thank you.

8 THE COURT: Okay. Next question: Does
9 the 3 to 4 square feet -- and I think, Mr. Bauman,
10 this is your question -- of coal in coalfields make
11 any difference in regards to land disposal or have
12 any effect on runoff because of rain, question
13 mark.

14 THE WITNESS: It may, because of its
15 configuration on the ground, serve to channel the
16 rain in a certain direction when it hits the coal.
17 But it makes no differentiation in terms of
18 disposal for RCRA, if there was coal on the ground,
19 if RCRA-regulated waste is dumped right on top of
20 that.

21 THE COURT: Okay. And that, again, coal
22 is not a raw material?

23 THE WITNESS: It is a raw material, your
24 Honor.

25 THE COURT: Okay.

1 THE WITNESS: When it's being used as a
2 raw material.

3 THE COURT: It makes no difference?

4 THE WITNESS: No.

5 THE COURT: Okay. That's the answer to
6 one of the questions. The second question is this:
7 Has -- if you know, and for the relevant years in
8 question, has anyone actually determined the depth
9 of the coal, for example, by means of a core sample
10 or the like?

11 THE WITNESS: I don't know. I did hear
12 reference to, you know, between 3 and 6 feet of
13 coal, but I've never seen anything where anyone
14 went out and actually did borings to determine the
15 actual thickness.

16 THE COURT: Okay. So you don't know?

17 THE WITNESS: No, I do not know.

18 THE COURT: Okay. All right.

19 Mrs. Funderburk, I think this is your question, and
20 it relates to under RCRA: In your opinion,
21 Mr. Flax, would the runoff of tar sludge and coal
22 from the coal piles into the ditches be considered
23 hazardous waste?

24 THE WITNESS: The runoff of the tar sludge
25 would be considered hazardous waste. The runoff

1 from the coal, no. That's a raw ingredient.

2 THE COURT: Okay. Next question,
3 Mr. Collins, I believe: Do you know if the mixing
4 of K087 was done on a pad or back in the
5 coalfields?

6 THE WITNESS: The indications I have from
7 the inspection reports that I've read from my own
8 staff indicates that they were told that the mixing
9 of the tar sludge was done in the coalfields and
10 not on the pad. I also had some indications that
11 there were times when they infrequently did use the
12 pad, but that most of the time it was done in the
13 coalfields on the ground.

14 A JUROR: I meant today, like now.

15 THE COURT: Okay. What I'm going to do is
16 I'm going to let the question that I asked,
17 anticipating that it was your question, stand. The
18 question that you want answered is not relevant, so
19 I'm not going to be able to answer that, and it's
20 not a consideration for you as of today. Okay?

21 A JUROR: Okay.

22 THE COURT: Thank you. Okay. And then,
23 Miss Russ, we're going to ask your question: Coal
24 is a raw material and therefore is unregulated, but
25 when the coal is mixed with the K087 or D018 --

1 18 -- is that mixture an unregulated raw material?

2 THE WITNESS: That's a very good question.

3 The coal is an unregulated raw material. The tar

4 sludge is a regulated material. The mixture of the

5 coal tar sludge with the coal does not make the

6 whole mixture a regulated material, but the tar

7 sludge remains a regulated material.

8 THE COURT: All right. Let me ask you

9 this. The question goes on to say then: Why or

10 why not?

11 THE WITNESS: Because mixtures of raw

12 ingredients and hazardous waste do not make the

13 whole mixture a hazardous waste.

14 THE COURT: Okay. Yes, Mr. Mango?

15 MR. MANGO: Yes, your Honor. I have a

16 brief follow-up, if I could, to the first question

17 in light of the answer. Do you want me to stand

18 here or sit here?

19 THE COURT: No, you can come to the

20 podium, and then I will open it up to the other

21 attorneys to follow up if they choose to do that.

22 But, again, ladies and gentlemen, those

23 questions and the responses I -- obviously, they're

24 good questions. I hope the responses have been of

25 assistance to you. But the procedure is that we

1 will now allow the attorneys to follow up, and then
2 we will bring Mr. Flax's testimony to a closure.
3 Okay.

4 All right, Mr. Mango, please.

5 MR. MANGO: Thank you very much, your
6 Honor.

7 Mr. Flax, I'd like to just go back to the first
8 question you were asked, where you talked about
9 storage of material in abandoned tanks. And you
10 constitute that as storage in tanks is by
11 definition active management, is that correct?

12 THE WITNESS: Correct.

13 MR. MANGO: Now, can you contrast that to
14 storage of material that is just on the ground?

15 THE WITNESS: Well, storage -- material
16 that is stored on the grounds -- are you talking
17 about pre-RCRA implementation or post-RCRA
18 implementation?

19 MR. MANGO: Pre and then post, if you can
20 tell the jury.

21 THE WITNESS: All right. Well, previous
22 to the implementation date of RCRA in November
23 1980, material on the ground was not regulated.
24 Material that had previously been disposed,
25 abandoned on the ground, was not regulated. And

1 the agency made a decision not to regulate that
2 material, when RCRA was implemented, unless it
3 became actively managed. The idea was, it's there,
4 don't mess around with it. If you're going to
5 manage it, then we want you to do it under a RCRA
6 permit so that can be done under the right
7 conditions and -- and sufficient agency oversight
8 of your management of that material can be given.

9 So if it was not actively managed after RCRA
10 was implemented, leave it alone. If you're going
11 to actively manage it, we want to be able to see
12 what you're doing. So if you did that after RCRA
13 was implemented, you needed a RCRA permit so that
14 we would have that oversight and it would be done
15 properly.

16 MR. MANGO: Thank you. And then the
17 question related to materials that remained in
18 tanks, that's different, is that correct?

19 THE WITNESS: Tanks are storage, and
20 storage by definition is active management.

21 MR. MANGO: Okay. Thank you. That was my
22 only follow-up, your Honor. Thank you.

23 THE COURT: Okay, Mr. Mango. Thank you.

24 Mr. Linsin?

25 MR. LINSIN: I have nothing further.

1 Thank you, your Honor.

2 THE COURT: Mr. Personius?

3 MR. PERSONIUS: No questions, your Honor.

4 Thank you.

5 THE COURT: Okay. Mr. Flax, you're
6 excused. Thank you very much.

7 THE WITNESS: Thank you, your Honor.

8 THE COURT: Is that the last government
9 witness?

10 MR. MANGO: Yes, your Honor. The
11 government rests.

12 THE COURT: Okay. Okay, ladies and
13 gentlemen, both sides have now rested. And now we
14 have to work out the details of getting you the
15 instructions, settling the exhibits, getting all of
16 that finalized. Are you holding up okay today?
17 Okay.

18 And then there will be, obviously, closing
19 arguments. And remember what I've said, that all
20 these discussions that I have with you and the
21 discussions with the lawyers, none of that is
22 evidence.

23 The closing arguments will not be evidence, but
24 it will be, I believe, very different from the
25 opening statements that you have heard, because now

1 you have heard all of the evidence. You know more
2 about this case than anybody walking the face of
3 the earth. And the lawyers now put on a different
4 hat, so to speak, and they will in their arguments
5 try to persuade you, from the evidence, as to
6 whether or not there's enough to convince you
7 beyond a reasonable doubt as to satisfying the
8 government's burden in this case or not.

9 And, obviously, if the government doesn't
10 satisfy its burden on any of the counts, you must
11 acquit; and, likewise, convict if the government
12 has convinced you beyond a reasonable doubt. So
13 that means that you have to apply the law as I give
14 it to you without questioning the wisdom of the
15 law. And I'll give you a couple of definitions
16 that you've heard about in terms of active
17 management in, terms of -- what's the other?

18 MR. MANGO: Land disposal.

19 THE COURT: Yeah, land disposal. Both of
20 those I will give you, plus a lot of definitions, a
21 lot of information. So, that's all to come.

22 What I'm going to ask you to do, and I know
23 we're shuttling you in and out, and you know you're
24 not coming back in the morning, so we'll see you
25 tomorrow at noon, but I need to work out a couple

1 of things with the attorneys right now, and I'll
2 have you back in here in, hopefully, 15 or so
3 minutes, and then I'll let you know what is left in
4 store for today. Okay?

5 All right. Thank you very much. We'll see you
6 in about 15 or so.

7 (Jury excused from the courtroom.)

8 THE COURT: Okay. Please have a seat.

9 All right. I'd like to find out -- I know,
10 Mr. Personius, you had mentioned that with respect
11 to the first 38 charges -- and obviously some of
12 these perhaps need to be excluded, but I'll take
13 the comments of the attorneys. What I'll do is
14 I'll go this way. Charge number 1, any comment.
15 Otherwise, if I hear none, I'll move to 2 and
16 charge 1 will be accepted. Does that work for
17 everybody?

18 MR. PERSONIUS: Yes, Judge.

19 THE COURT: Okay. Charge 1, juror
20 attentiveness. Hearing nothing, charge number 2 --
21 and hearing nothing, it's accepted.

22 Charge number 2, role of the Court. Hearing
23 nothing, accepted.

24 Charge number 3, role of the Court. Hearing
25 nothing, accepted.

1 Charge number 4, juror obligations. Hearing
2 nothing, accepted.

3 Charge number 5, the government as a party.
4 Hearing nothing, accepted.

5 Charge number 6, conduct of counsel. Hearing
6 nothing, accepted.

7 Charge number 7, common counsel and counsel
8 cooperation. Hearing nothing, accepted.

9 Charge number 8, jury to consider only these
10 defendants. Hearing nothing, accepted.

11 Charge number 9, consider each defendant
12 separately. Hearing nothing, accepted.

13 Charge number 10, multiple counts, multiple
14 defendants. Hearing nothing, accepted.

15 Charge number 11, improper considerations,
16 race, religion, national origin, sex, or age.
17 Hearing nothing, accepted.

18 Charge number 12, sympathy. Hearing nothing,
19 accepted.

20 Charge number 13, punishment. Hearing nothing,
21 accepted.

22 Charge number 14, testimony and exhibits in
23 general. Hearing nothing, accepted.

24 Charge number 15, stipulations of fact.
25 Hearing nothing, accepted.

1 Charge number 16, judicial notice.

2 MR. LINSIN: Your Honor, it was just one.

3 I don't believe, based on our recollection, the
4 Court has taken judicial notice of any facts, so we
5 don't see this as necessary.

6 THE COURT: I can take judicial notice of
7 the fact that we didn't take judicial notice in
8 this case, if that works, just so we keep it in
9 here. No. Okay. No, I agree. And I think charge
10 number 16 -- I will leave it so we don't throw all
11 the numbers off. It will be intentionally left
12 blank. When I give everything to the jury, charge
13 number 16 -- I don't want to renumber everything.
14 It gets really cumbersome. It will be
15 intentionally left blank, okay?

16 MR. LINSIN: All right.

17 THE COURT: Charge number 17, charts and
18 summaries.

19 MR. MANGO: I think everything has been
20 admitted at this point.

21 THE COURT: Yes.

22 MR. MANGO: Charts and summaries.

23 THE COURT: Accepted, having heard
24 nothing. Okay.

25 Charge number 18. Yes?

1 LAW CLERK: Can we go back to 17?

2 THE COURT: Sure.

3 LAW CLERK: So do you want to -- if you
4 did instruct the jury, you gave them the other
5 charge on charts admitted. This one is not
6 admitted as evidence. So are we going to
7 substitute the charge you already gave, were there
8 some of each, or --

9 MR. MANGO: That's why I noted it, because
10 it says in parentheses not admitted as evidence,
11 and I think all the charts have been admitted so --

12 LAW CLERK: Should substitute the other
13 charge for this one in the same spot.

14 MR. MANGO: I think that would be
15 appropriate.

16 MR. LINSIN: Which other charge are you
17 referring to?

18 LAW CLERK: It's not one in the materials.
19 It's the one the Judge gave at the time the chart
20 came in. You gave a different charge that's not
21 in --

22 THE COURT: All right.

23 MR. LINSIN: We would agree with the
24 substance of what's -- we would agree with counsel
25 for the government that that would be appropriate.

1 LAW CLERK: It was a standard charge.

2 THE COURT: All right. Thank you. Okay.

3 Question -- charge number 18, questions.

4 Hearing nothing, admitted.

5 Charge 19, direct and circumstantial evidence.

6 Hearing nothing, admitted.

7 Okay. Charge number 20, similar acts. Hearing
8 nothing, admitted.

9 Charge number 21, inference defined. Hearing
10 nothing, admitted.

11 Charge number 22, impermissible to infer
12 participation from mere presence.

13 MR. LINSIN: I defer to Mr. Personius on
14 that, your Honor. To me it doesn't seem relevant
15 to the facts in this case, but I would defer to
16 Mr. Personius.

17 MR. PERSONIUS: Your Honor, are we on 22
18 or 23, please?

19 THE COURT: 22. My own view is it should
20 go in.

21 MR. PERSONIUS: Yes, I think it should.

22 THE COURT: And likewise with 23.

23 MR. LINSIN: All right. Fine. No
24 objection, your Honor, certainly.

25 MR. PERSONIUS: Yes.

1 THE COURT: Okay. Both will be given.

2 Number of witnesses and uncontradicted
3 testimony, number 24. Hearing nothing, admitted.

4 25, witness credibility generally. Hearing
5 nothing, admitted.

6 Charge number 26, admission of defendant.
7 Hearing nothing, admitted.

8 Charge number 27, law enforcement witness.
9 Hearing nothing, admitted.

10 28, informal immunity of government witness.

11 MR. MANGO: Your Honor, I thought this
12 would be an issue. There were a number of
13 witnesses who did have informal immunity, but it
14 was not questioned on cross, we didn't bring it out
15 on direct, and I don't think we need this charge.

16 THE COURT: All right. I've got a
17 question mark next to my copy, so I don't know what
18 defense counsel feel.

19 MR. LINSIN: We don't have a recollection,
20 your Honor, of this being raised with any witness.

21 THE COURT: No, I don't believe it was.

22 MR. PERSONIUS: I don't think it was,
23 Judge. I think Mr. Mango's right.

24 THE COURT: Okay. All right. So then
25 this will similarly be designated as intentionally

1 left blank.

2 Okay. 29, impeachment by prior inconsistent
3 statement. Hearing nothing, accepted.

4 Charge number 30, interest in the outcome.
5 Hearing nothing, accepted.

6 31, bias and hostility. Hearing nothing,
7 accepted.

8 Charge number 32, presumption of innocence and
9 burden of proof. Hearing nothing, accepted.

10 Reasonable doubt, that's charge 33. Hearing
11 nothing, accepted.

12 Charge number 34A, improper consideration of
13 defendant's right not to testify. That, I think,
14 would apply only to your client, I think,
15 Mr. Personius.

16 MR. PERSONIUS: Yes. We would like that
17 charge.

18 THE COURT: Okay. Hearing nothing in
19 opposition, accepted.

20 34B intentionally left blank?

21 MR. PERSONIUS: Yes.

22 MR. LINSIN: Yes, that's acceptable, your
23 Honor.

24 THE COURT: Okay. Charge number 35,
25 specific investigative techniques not required.

1 MR. PERSONIUS: I had a question, Judge,
2 on whether that -- I don't see how that was raised
3 as an issue. I don't see this charge as applying.

4 MR. MANGO: I agree, your Honor.

5 MR. LINSIN: I agree as well, your Honor.

6 THE COURT: Okay. I mean, that's kind of
7 an odd charge anyway, I mean, generally speaking,
8 because it's confusing, but --

9 MR. PERSONIUS: That's why the defense
10 sometimes like it, Judge, but I don't think it
11 applies here.

12 THE COURT: I know, because it does come
13 up in certain types of cases, but I think it's a
14 little difficult in this one, so I will --

15 MR. LINSIN: Maybe core samples, your
16 Honor.

17 THE COURT: It's a valiant effort, I
18 think, but -- okay. You know, it will probably be
19 one of the issues with the jury, right? Okay.
20 Charge number 35 will be intentionally left blank.

21 36, corporate responsibility.

22 MR. LINSIN: No objection.

23 THE COURT: Hearing nothing, accepted.

24 Responsible corporate officer. Hearing
25 nothing, accepted.

1 And indictment is not evidence. Hearing
2 nothing, accepted.

3 And then we'll stop there. Okay?

4 All right. I'd like to maybe take another ten
5 minutes, and then I'd like to start this portion of
6 the charge, complete it, let the jury go. I mean,
7 this is probably just short of an hour, probably.
8 And let them go for the day, and then we start
9 tomorrow roughly at 12:00 o'clock or so.

10 MR. LINSIN: And what is the Court's
11 pleasure with regard to discussion then on -- our
12 discussion regarding the substantive charges?
13 If --

14 THE COURT: We'll do that tomorrow
15 morning. We'll have a charge conference.

16 MR. LINSIN: All right.

17 THE COURT: Does that work for everybody?

18 MR. MANGO: Absolutely.

19 THE COURT: And we'll -- 9:30? What do we
20 have calendarwise, please?

21 Mary will be leaving us for a few days.

22 It's rehab, but I wasn't supposed to say.

23 MR. PERSONIUS: She has asked that the
24 fireman who was at Tonawanda Coke tape the
25 summations so she can watch them, Judge.

1 THE COURT: All right. How about
2 10:00 o'clock tomorrow?

3 MR. MANGO: That would be great.

4 THE COURT: All right. And then, you
5 know, we'll take a look at what your positions are.
6 We should be able to get everything resolved by
7 noonish. Actually, you probably want to move it as
8 quickly as we can so you can kind of rest up for
9 summations.

10 MR. LINSIN: Well, some of the
11 arguments -- it would be helpful to have some
12 period of time between the resolution and perhaps
13 the need to adjust some of how we've addressed this
14 in the closing, in the summation.

15 THE COURT: Yeah. Why don't we do this.
16 Why don't we make it 9:30. I'll try to move the
17 calendar as quickly as I can. That might give us a
18 little bit of extra time.

19 MR. LINSIN: Thank you, your Honor.

20 THE COURT: Okay. All right. Let's take
21 ten or so, and then we'll be back out, Chris, and
22 we'll get started. Okay?

23 (Short recess was taken.)

24 THE COURT: Are we all set?

25 MR. MANGO: Yes, your Honor.

1 THE COURT: Okay. Chris, if you'd bring
2 the jury in, please.

3 (Jury seated.)

4 THE COURT: Everybody doing okay? Welcome
5 back. Please have a seat.

6 Thank you, Chris.

7 COURT SECURITY OFFICER: You're welcome,
8 sir.

9 THE COURT: Okay. Ladies and gentlemen,
10 here's what is in store for you for this afternoon.
11 And, as you know, my job, kind of as the referee,
12 draws to a close, and then I give you what is the
13 charge or the instruction in the law, and then you
14 are to apply that law without questioning the
15 wisdom of the law. You've heard me say that
16 before.

17 You've heard me say a lot of things, and it's
18 been repetition by design, so that when I get to
19 giving you the full instruction, most of the terms
20 you will have been familiar with, you would have
21 heard, and they will come together a little bit
22 easier.

23 The one thing I want to stress is this. I'm
24 going to only give you a part of it this afternoon,
25 all right, and it's the preliminary part. But keep

1 this in mind, and, you know, if you think about it,
2 because you're going to be asked to apply your
3 common sense, your experience, and your
4 intelligence to everything that you do from this
5 point forward. And you've got a lot of listening
6 to do, all right, and you should listen intently.
7 I mean, you've been terrific with all the
8 complexities and everything in this particular
9 case. And now you're going to be hearing from the
10 attorneys starting tomorrow afternoon.

11 What I'd like to do is give you a part of what
12 we call the charge or the instruction. But using
13 your common sense, just keep in mind that the total
14 charge that I give you is the instruction in the
15 law. No one part is separate and more important
16 from the totality of the charge. There's one law,
17 one instruction in the law, that applies. And it's
18 everything that I'm going to be telling you.

19 It makes sense to me, anyway, to break it down,
20 to give you this preliminary portion of the charge,
21 and we'll address some of the terms that you've
22 been hearing about in terms of burden of proof and
23 definitions of certain terms. We'll get to all of
24 that and how you proceed, and credibility and the
25 like. So I'll give you that first, and then we're

1 going to take a break for the afternoon, and you'll
2 come back tomorrow at noon, you'll hear the
3 attorneys argue, and then there is the remaining
4 part of the instruction that I still will have to
5 give you before you start your deliberations.

6 And if there is anything that -- when the
7 arguments come, that appears different from what I
8 tell you today or what I will give you by -- in the
9 charge portion that follows the closing arguments,
10 your instruction will be to rely on what I say, not
11 what the attorneys say. But you can use,
12 certainly, their argument to guide you in coming to
13 a resolve on the critical issues in this case,
14 because you have to decide those fact issues.
15 That's why you're here. You're the judges of the
16 facts.

17 So, I am going to start. I'll work through
18 this. I'll try to be as deliberate as possible so
19 that you get an understanding of at least the start
20 of this charge, and then we'll work through another
21 time the breakdown of the different counts of the
22 indictments and the elements. We started with some
23 of that, if you remember, at the very beginning of
24 the case, trying to get you to focus and think in
25 terms of elements which the government has to

1 prove, because they're essential, beyond a
2 reasonable doubt.

3 So, you get these instructions before you
4 actually enter into your final duty, which is to
5 decide the fact issues in this case. Please pay as
6 close attention to me now as you have throughout
7 the course of the trial. That's because, you know,
8 frankly, it's not a personal thing with me, but
9 this case is very important to both sides. And the
10 only way that you can satisfy your duty in the
11 manner in which you have taken the oath to do in
12 this case is to pay strict and close attention to
13 what I say, what the attorneys will argue to you,
14 and to apply the law as I give it to you.

15 I did mention to you at the very start of the
16 trial that your principle function during the
17 taking of testimony would be to listen carefully
18 and observe each witness who testified, and I've
19 told you this many times. It's been very obvious
20 to me and, I know, to the attorneys as well, that
21 you have faithfully discharged that duty, and you
22 did follow the testimony -- and that's evidenced by
23 the questions you've asked -- with the closest of
24 attention. So I will proceed and just simply ask
25 you to give me your careful attention with this

1 instruction.

2 You have heard all of the evidence in the case,
3 and you are about to hear the closing arguments of
4 the lawyers for the parties, and you know that's
5 the United States, Tonawanda Coke Corporation, and
6 Mark Kamholz. My duty at this point is to instruct
7 you as to the law. It's your duty to accept these
8 instructions of law and apply them to the facts as
9 you determine them, and just as it has been my duty
10 to preside over the trial and decide what testimony
11 and evidence is relevant under the law for your
12 consideration.

13 On the legal matters, you must take the law as
14 I give it to you, and if an attorney says
15 something -- and we just talked about this -- and
16 states a legal principle different from any that I
17 state to you in my instructions, it is my
18 instructions that you must follow.

19 And you should not single out any instruction
20 as alone stating the law, but you should consider
21 my instruction as a whole when you retire to
22 deliberate in the jury room. It's like when you're
23 working on a project. The end result of everything
24 you do is the completed item, project, something
25 that, you know, you may have constructed. That's

1 the end. That's the totality. And that's the same
2 with this charge that I'm in the process of giving
3 you.

4 Again, don't be concerned about the wisdom of
5 the rule of law that I state, because regardless of
6 any opinion that you may have as to what the law
7 may be or ought to be, it would in point of fact
8 violate your sworn duty to base a verdict upon any
9 other view of the law than that which I'm going to
10 give you starting now.

11 Your final rule -- role is to pass upon and
12 decide the fact issues. We've talked about that
13 many times. You, the members of the jury, are the
14 sole and exclusive judges of the facts. You pass
15 upon the weight of the evidence, you determine the
16 credibility, the believability of the witnesses,
17 and you resolve such conflicts as there may be in
18 the testimony, and you draw whatever reasonable
19 inferences you decide to draw from the facts as you
20 have determined them.

21 And I will soon give you instructions upon how
22 to pass upon the credibility, and that's the same
23 thing as we talk about when we say the
24 believability of the witnesses.

25 In determining the facts, you must rely upon

1 your own recollection of the evidence. What the
2 lawyers have said in their opening statements, what
3 they will say in their closing arguments, what has
4 been discussed in the objections or in their
5 questions, is not evidence.

6 In this connection, you should bear in mind
7 that a question put to a witness is never evidence.
8 It is only the answer which is evidence. Nor is
9 there anything I may have said during the trial or
10 may say during these instructions or the arguments
11 with respect to a fact matter to be taken -- is to
12 be taken in substitution for your own independent
13 recollection. Simply, common sense, experience,
14 intelligence. What I say is not evidence. That's
15 how this works.

16 The evidence in this case before you consists
17 of the answers given by the witnesses to the
18 questions -- but the questions aren't evidence --
19 the testimony of those witnesses as they gave it,
20 as you recall it, remember, respecting each other's
21 input, judgment, and the exhibits that now have
22 been received into evidence. And you will get all
23 of those.

24 The evidence does not include questions. Only
25 the answers are evidence. But you may not consider

1 any answer that I directed you to disregard or that
2 I directed struck from the record. Do not consider
3 those questions; do not consider those answers.
4 That happened just a few times in this case.

5 You may also consider stipulations, and there
6 were a fair number of those, and it related in
7 large measure to the exhibits that were received
8 into evidence. And you'll notice that when you get
9 the list of exhibits and the exhibits themselves.
10 But remember I told you that in those instances
11 where witnesses are referenced, you are supposed to
12 view that as the testimony of a witness as if he or
13 she appeared here in court.

14 Since you are the sole and exclusive judges of
15 the facts, I do not mean to indicate any opinion as
16 to the facts or what your verdict should be,
17 personally. That's your duty. The rulings I have
18 made during the trial are not any indication of my
19 views of what your decision should be as to whether
20 or not the guilt of the defendants, individually
21 considered, has been proven beyond a reasonable
22 doubt. Only you can decide that.

23 I also ask you to draw no inference from the
24 fact that upon occasion I asked questions of
25 certain witnesses. These questions, not as good as

1 yours most of the time, but were only intended for
2 clarification or to expedite matters, and certainly
3 were not intended to suggest any opinions on my
4 part as to the verdict you should render or whether
5 any of the witnesses may have been more credible
6 than any other witness.

7 You are expressly to understand that the court,
8 meaning me, has no opinion as to the verdict you
9 should render in this case. As to the facts -- I
10 bet you've heard this a few times, right? -- you
11 are the exclusive judges. You are to perform the
12 duty of finding the facts without bias or prejudice
13 as to any party. Be fair to both sides.

14 In determining the facts, you are reminded that
15 before each member, each of you, was accepted and
16 sworn to act as a juror, you were asked questions
17 concerning competency, qualifications, fairness,
18 and freedom from prejudice and bias. And it was on
19 the faith of those answers that each of you was
20 accepted to be jurors by the parties. Therefore,
21 those answers that you gave are as binding on each
22 of you now as they were then when you were first
23 accepted and should remain so until you are
24 discharged from consideration in this case.

25 You are to perform your duty of finding the

1 facts, importantly, without bias or prejudice to
2 any of the parties. You are to perform your final
3 duty in an attitude of complete fairness and
4 impartiality. The case is important to the
5 government -- we've stressed that before -- for the
6 enforcement of criminal laws is a matter of prime
7 concern to the community. And equally it is
8 important to the defendants -- we've stressed this
9 before -- because they're charged with serious
10 crimes.

11 The fact that the prosecution is brought in the
12 name of the United States of America entitles the
13 government to no greater consideration than that
14 accorded to any other party to a litigation. By
15 the same token, it is entitled to no less
16 consideration. We're talking about fairness here.
17 All parties, whether government or individuals,
18 stand as equals at the bar of justice.

19 It is also the duty of the attorney for each
20 side in the case to object when the other side
21 offers testimony. We've talked about that from the
22 beginning. And when there's evidence that's being
23 offered, the same duty applies to the attorney, and
24 that should be where the attorney believes that
25 what's being offered is not properly admissible.

1 The attorneys also have the right and duty to
2 ask me to make rulings of law and to request
3 conferences. We've had a few sidebars, as you
4 know, out of -- out of your hearing, technically.
5 And usually that's so that I can decide the
6 questions of law that are discussed. And my
7 instruction is that you should not show any
8 prejudice against any attorney or his client
9 because the attorney objected to the admissibility
10 of evidence, or asked for a conference out of your
11 hearing, or asked me for a ruling of the law.

12 As I've already indicated, my rulings on the
13 admissibility of evidence do not indicate any
14 opinion about the weight or effect of the evidence.
15 You are the sole judges of the believability of all
16 witnesses and the weight and the effect of all of
17 the evidence.

18 You have noticed, I'm sure -- and, you know, we
19 had weekly introductions to the attorneys and whom
20 they represent -- that the two defendants, the
21 corporation and Mark Kamholz, are represented by
22 separate attorneys, and the separate attorneys have
23 consulted from time to time with each other and to
24 some extent have divided the work of the trial in
25 an effort, really, to facilitate their presentation

1 and to avoid duplication.

2 The fact that defense counsel have consulted
3 and cooperated with each other in the conduct of
4 their defense is not to be considered by you as
5 having any significance with respect to the issues
6 in this case. The issue of each defendant's guilt
7 is personal, and you must take -- or make a
8 separate determination as to whether or not each
9 defendant's guilt has been proven -- what? --
10 beyond a reasonable doubt.

11 In making that judgment, you are to disregard
12 entirely the circumstance that the attorneys for
13 the defendants have worked together during the
14 trial. Indeed, especially in a case of this
15 length, it would be unusual and wasteful of time
16 and effort if the attorneys did not get together,
17 share the burdens of the defense, et cetera.

18 Now, you are about to be asked to decide
19 whether or not the government in this case has
20 proven beyond a reasonable doubt the guilt of each
21 defendant. You are not being asked whether any
22 other person has been proven guilty. Your verdict
23 should be based solely upon the evidence or --
24 what? -- the lack of evidence, as to each defendant
25 in accordance with my instructions and without

1 regard to whether the guilt of other people has or
2 has not been proven.

3 The indictment names two defendants who are at
4 trial together, and in reaching a verdict you must
5 bear in mind that the guilt determination is
6 individual. Your verdict as to each defendant must
7 be determined separately with respect to each
8 defendant solely on the evidence or lack of
9 evidence presented against each defendant without
10 regard to the guilt or innocence of anyone else.

11 In addition, some of the evidence in this case
12 was limited to one defendant, Tonawanda Coke, for
13 example. Let me emphasize that any evidence
14 admitted solely against one defendant may be
15 considered only against that defendant and may not
16 in any respect enter into your deliberations on any
17 other defendant. Thus, you must not consider any
18 evidence that I limited to Tonawanda Coke, for
19 example, in any way in your deliberations with
20 respect to defendant Mark Kamholz. They must each
21 be considered individually and separately.

22 You know the indictment, by now, contains 19
23 counts, right? And each count charges the
24 defendants with a different separate crime. There
25 are two defendants on trial before you. You must,

1 as a matter of law, consider each count of the
2 indictment and each defendant's involvement in that
3 count separately, and you must return a separate
4 verdict on each defendant for each count in which
5 they are charged. And you'll get a verdict form
6 that will itemize for you each defendant on each
7 count.

8 In reaching your verdict, bear in mind that
9 guilt is personal and individual. Your verdict of
10 guilty or not guilty must be based solely upon the
11 evidence about each defendant. The case against
12 each defendant on each count stands or falls upon
13 the proof or lack of proof against that defendant
14 alone, and your verdict as to any defendant on any
15 count should not control your decision as to any
16 other defendant or any other count. No other
17 considerations are proper.

18 Your verdict must be based solely upon the
19 evidence developed at trial or the lack of
20 evidence, and it would be improper for you to
21 consider in reaching your decision as to whether
22 the government sustained its burden of proof --
23 because that is what you have to determine --
24 whether any personal feelings you may have about
25 the defendant's race, religion, national origin,

1 sex, or age influence you. All persons are
2 entitled to the presumption of innocence, and the
3 government has the burden of proof, as I will
4 discuss in a moment.

5 It would be equally improper for you to allow
6 any feelings you might have about the nature of the
7 crime charged to interfere with your
8 decision-making process. And in part that's why we
9 told you stay away from things outside the
10 courtroom. To repeat: Your verdict must be based
11 exclusively upon the evidence or the lack of
12 evidence in this case.

13 You've also heard this, and, you know, every
14 juror in every case throughout the country in the
15 federal courts are going to hear these same
16 charges, these same instructions, and that's what
17 makes the system fair, and that's why we try to get
18 it ingrained in you as we go through this process.

19 So under your oath as jurors you're not to be
20 swayed by sympathy. You are to be guided solely by
21 the evidence in this case, and the crucial,
22 hard-core question that you must ask yourselves as
23 you sift through the evidence is this: Common
24 sense, experience, intelligence. Has the
25 government proved its case, that is, the guilt of

1 the defendants, beyond a reasonable doubt?

2 It is for you alone to decide whether the
3 government has proven that the defendants are
4 guilty of the crimes charged solely on the basis of
5 the evidence and subject to the law as I charge
6 you. It must be clear to you that once you let
7 fear or prejudice or bias or sympathy interfere
8 with your thinking, there is a risk that you will
9 not arrive at a true and just verdict. And you
10 know what you've invested in this case, and you
11 know what's at stake for the defendants.

12 If you have a reasonable doubt as to either of
13 the defendants' guilt, you should not hesitate for
14 any reason to find a verdict of acquittal for that
15 defendant. Not guilty. But on the other hand, if
16 you should find that the government has met its
17 burden of proving either or both of the defendants'
18 guilt -- what? -- beyond a reasonable doubt, you
19 should not hesitate because of sympathy or any
20 other reason to render a verdict of guilty.
21 Fundamental fairness.

22 The question of possible punishment of the
23 defendants should be and is of no concern to you
24 and should not in any sense enter into or influence
25 your deliberations. The duty of imposing a

1 sentence, if there happens to be a conviction,
2 rests exclusively on me, because I presided over
3 this trial. Your function is to weigh the evidence
4 in the case and to determine whether or not the
5 defendants are guilty beyond a reasonable doubt
6 solely upon the basis of such evidence. Under your
7 oaths of jurors -- or as jurors, you cannot allow a
8 consideration of the punishment which may be
9 imposed upon the defendants if they are convicted
10 to influence your verdict in any way or in any
11 sense enter into your deliberations.

12 Now, shortly I will explain to you the elements
13 of the crimes. I won't do that today. But I want
14 to discuss with you upon -- or the basis upon which
15 your verdict must rest. In summary -- you've heard
16 me mention this countless times -- it must be
17 based, your verdict, upon the evidence introduced
18 in this case.

19 The evidence in this case consists of what?
20 The sworn testimony of the witnesses and the
21 exhibits received in evidence and any stipulations
22 that have been received into evidence. In this
23 case there is no such thing as judicially noticed.
24 I haven't done that in this case. And that's when
25 I tell you what the evidence is. Here we've had

1 stipulations.

2 Exhibits which have been marked for
3 identification but not received may not be
4 considered by you as evidence. Only those exhibits
5 received may be considered as evidence. You'll get
6 an exhibit list, and it will contain only those
7 exhibits that have been received into evidence, and
8 you'll get the exhibits themselves. There may be
9 testimony about exhibits that weren't received into
10 evidence. You can consider that testimony, but you
11 will not get the exhibits, because they haven't
12 been admitted as competent evidence.

13 And, similarly, you are to disregard any
14 testimony when I have ordered it to be stricken. I
15 did that just a few times in this case. And as I
16 indicated to you before, only the witnesses'
17 answers are evidence, and you are not to consider a
18 question as evidence. Similarly, statements made
19 by counsel are not evidence.

20 You should consider the evidence in light of
21 your own common sense and intelligence and
22 experience, and you may draw reasonable inferences
23 from the evidence.

24 Anything you may have seen or heard about this
25 case outside the courthouse is not evidence and

1 must be entirely disregarded.

2 If you remember, a stipulation, that's an
3 agreement among the attorneys and the parties --
4 the corporation and the defendant -- that a certain
5 fact is true. And when you get a stipulation, you
6 should regard the agreed fact as established as
7 true, and you may choose to give it whatever
8 consideration you feel is appropriate.

9 The government has presented exhibits in the
10 form of charts and summaries, and so has the
11 defendant, and I decided that those charts and
12 summaries will be admitted, and they represent an
13 effort to save time and avoid unnecessary
14 inconvenience and give you guidance with respect to
15 certain opinions that were rendered by the
16 witnesses; or they reference, you know, large
17 quantities of documents and discs and the like that
18 have been introduced to you at trial, and try to
19 make it more understandable and make it more
20 workable for you to consider without having to
21 expend an inordinate amount of time doing that.
22 And you should consider those charts and summaries
23 and the testimony and the underlying documents, to
24 the extent that they have been provided to you, as
25 you would any other evidence in this case.

1 Again, let me emphasize that a lawyer's
2 question is not evidence. At times a lawyer on
3 cross-examination may have incorporated into a
4 question a statement which assumed certain facts to
5 be true and asked the witness if the statement was
6 true. If the witness denies the truth of the
7 statement and there is no evidence in the record
8 proving that the assumed fact is true, then you may
9 not consider the fact to be true simply because it
10 was contained in the lawyer's questions. And
11 lawyers on both sides sometimes do that. And not
12 intentionally, but you have to apply that rule and
13 just consider the answers of the witnesses as the
14 evidence.

15 And, you know, one of the examples that we give
16 sometimes, and I really don't like this example,
17 but sometimes a lawyer, by way of example, will ask
18 the question of a married witness, "When did you
19 stop beating your spouse?" Well, you would not be
20 permitted to consider as true the assumed fact that
21 the witness ever beat his or her spouse unless the
22 witness indicated he or she had or unless there is
23 some other evidence in the record that he or she
24 had beaten the spouse. And that's why the
25 questions are not the evidence but the answers are.

1 There are two types of evidence which you may
2 properly use in deciding whether a defendant is
3 guilty or not. One type is called direct evidence.
4 Direct evidence is where a witness testifies as to
5 what he or she saw, heard, or observed. In other
6 words, when a witness testifies about what is known
7 to him or her of his or her own knowledge by virtue
8 of that witness's own senses, what he or she sees,
9 feels, touches or hears, that's what? Direct
10 evidence, right? I mean, that's common sense.

11 Circumstantial evidence, a little bit
12 different. It's what tends to prove a disputed
13 fact by proof of other facts. And there's a simple
14 example. I think we talked about it when we were
15 going through jury selection that we use to
16 demonstrate this. And that's when, for example,
17 you entered the courthouse in the morning, the sun
18 was shining, it was a nice day, and then, you know,
19 after the course of the day and you can't really
20 see outside, somebody comes in walking in with an
21 umbrella dripping wet or snow particles,
22 individuals came in with raincoats, overcoats, and
23 the like, you know that even though you can't look
24 outside the courtroom and you can't see whether
25 weather conditions had changed, rain or snow, you

1 have no direct evidence of what's going on outside,
2 but on the combination of facts which I have just
3 asked you to assume, it would be reasonable and
4 logical for you to conclude that it had been either
5 raining or snowing.

6 I mean, that's the logical way of handling
7 circumstantial evidence. But it is the equal of
8 direct evidence. That's all there is. That's
9 circumstantial evidence. You infer on the basis of
10 reason and experience and common sense from an
11 established fact the existence or the nonexistence
12 of some other fact.

13 Circumstantial evidence has no less value than
14 direct evidence, for it is a general rule that the
15 law makes no distinction between direct and
16 circumstantial evidence, but simply requires that
17 before convicting a defendant the jury must be
18 satisfied of the defendant's guilt -- what? --
19 beyond a reasonable doubt from all of the evidence
20 in the case.

21 Now, the government in this case has offered
22 certain evidence tending to show that on a
23 different occasion the defendants engaged in
24 conduct similar to the charges in the indictment.
25 In that connection, let me remind you this way,

1 that the defendants are not on trial for committing
2 any acts not alleged in the indictment. Okay. And
3 that's why sometimes questions are not relevant,
4 because they pertain to a period of time outside of
5 the indictment, just by way of example.

6 So you may not consider the evidence of the
7 similar act as a substitute for proof that the
8 defendants committed the crimes charged, nor may
9 you consider this evidence as proof that the
10 defendants have a criminal personality or bad
11 character.

12 The evidence of other similar acts was admitted
13 for a much more limited purpose, and you may
14 consider it only for that limited purpose. If you
15 determine that the defendants committed the acts
16 charged in the indictment and the similar acts as
17 well, then you may, but you need not, draw an
18 inference that in doing the acts charged in the
19 indictment the defendant acted knowingly and
20 intentionally and not because of some mistake,
21 accident, or other innocent reasons.

22 Evidence of similar acts may not be considered
23 by you for any other purpose. Specifically, you
24 may not use the evidence to conclude that because
25 the defendants committed the other acts they must

1 also have committed the acts charged in the
2 indictment. You decide the acts charged in the
3 indictment, the crimes that are charged in the
4 indictment.

5 So let's talk a little bit about inference and
6 that term, because it's been mentioned to you, and
7 we talk about it in the context of reasonable
8 inferences. And you'll probably hear the attorneys
9 ask you or at least comment that -- tomorrow in
10 their closing arguments, that you may reasonably
11 infer such and such. And when you are asked that,
12 you will be asked to infer on the basis of your
13 reason, experience, and common sense, from one or
14 more established facts, the existence of some other
15 fact. Not complicated. Just draw a reasonable
16 inference.

17 That's what inference is. But what is it not?
18 Okay. An inference is not a suspicion or a guess.
19 It is a reasoned, logical decision to conclude that
20 a disputed fact exists on the basis of another fact
21 which you know exists.

22 Now, if you think about that, there may be
23 times when a different inference may be drawn from
24 a set of facts, whether proven by direct or
25 circumstantial evidence. The government may ask

1 you to draw one set of inferences, while the
2 defense may ask you to draw another.

3 It is for you and you alone to decide what
4 inferences you will draw. That's your job, because
5 that involves being the judges of the facts. The
6 process of drawing inferences from facts in
7 evidence, again, is not a matter of guesswork or
8 speculation. You've got to work at it. You've got
9 to know what that reasonable inference is.

10 An inference is a deduction or a conclusion,
11 which you, the jury, are permitted to draw, but
12 you're not required to draw it, from the facts
13 which have been established by either -- what kind
14 of evidence, because there's two kinds, right? --
15 direct or circumstantial. And in drawing the
16 inferences, you should exercise your common sense.
17 That's, you know -- and you can do it. You draw
18 the reasonable inferences.

19 So while you are considering the evidence
20 presented to you, you are permitted to draw from
21 the facts which you find to be proven such
22 reasonable inferences as would be justified in the
23 light of your everyday experience. I mean, you
24 represent the cross-section of our community.

25 Here again, let me remind you that whether

1 based upon direct or circumstantial evidence or
2 upon -- what? -- the logical, reasonable inferences
3 drawn from such evidence, you must be satisfied of
4 the guilt of a defendant, should you so find,
5 beyond a reasonable doubt, before you may convict.

6 Keep this in mind, too, that you may not infer
7 that the defendant is guilty of participating in
8 criminal conduct merely from the fact that he was
9 present at the time of the crime or at the time the
10 crime was being committed and had knowledge that it
11 was being committed. That mere presence is not
12 enough.

13 And you may not infer that the defendant was
14 guilty of participating in criminal conduct merely
15 from the fact that he associated with other people
16 who were guilty of wrongdoing.

17 And remember we talked about the number of
18 witnesses, too. What do -- we have 30 witnesses
19 that have testified. And the government called
20 more witnesses than the defense, and, you know,
21 it's -- whoever introduces more evidence than the
22 other doesn't mean that you should necessarily find
23 the facts in the favor of the side offering the
24 most witnesses or the most evidence. By the same
25 token, you do not have to accept the testimony of

1 any witness who has not been contradicted or
2 impeached if you find the witness not to be --
3 what? -- credible. The witness has to be
4 believable or credible.

5 You also have to decide which witnesses to
6 believe and which facts are true. To do this, you
7 must look at all the evidence, drawing upon your
8 common sense, your experience, your intelligence.
9 And after examining all the evidence, you may
10 decide that the party calling the most witnesses
11 has not persuaded you, because you do not believe
12 its witnesses or because you do believe the fewer
13 witnesses called by the other side.

14 Keep in mind, ladies and gentlemen, that the
15 burden of proof is where? It's always on the
16 government, and the defendants are not required to
17 call upon any witnesses or offer any evidence since
18 they are -- what? -- presumed innocent.

19 Now, you have had an opportunity to observe all
20 of the witnesses, and your job is to decide what
21 weight, if any, to give to their testimony, who's
22 believable, to what extent. In other words, how
23 believable was the witness who was called, in your
24 minds. You are the sole judges of the credibility
25 of each witness and of the importance of the

1 testimony that you've received from those
2 witnesses.

3 Now, it's probably clear to you by now that you
4 are being called upon to resolve the various
5 factual issues under the indictment. And you'll,
6 I'm sure, have those identified with specificity
7 tomorrow. And you're going to hear very different
8 pictures painted by the attorneys in this case,
9 which probably can't be reconciled. And you're
10 going to have to decide where the truth lies.

11 And an important part of that decision will
12 involve making judgments about the testimony of the
13 witnesses that you have listened to and observed.
14 And in making those judgments, you should carefully
15 scrutinize all of the testimony of each witness,
16 the circumstances under which each witness
17 testified, and any other matter in evidence which
18 may help you to decide the truth and the importance
19 of each witness's testimony.

20 Your decision whether or not to believe a
21 witness may depend on how that witness impressed
22 you. For example, was the witness candid, frank,
23 and forthright, or did the witness seem as if he or
24 she was hiding something, being evasive, or suspect
25 in some way? How did the witness testify on direct

1 examination compared with how the witness testified
2 on cross-examination? Was the witness consistent
3 in his or her testimony, or did he or she
4 contradict himself or herself? Did the witness
5 appear to know what he or she was talking about,
6 and did the witness strike you as one who was
7 trying to report his or her knowledge accurately?

8 How much each of you concludes to believe a
9 witness may be influenced by the witness's bias.
10 Does the witness have a relationship with the
11 government or a defendant which may affect how she
12 or he testified? Does the witness have some
13 incentive, loyalty, or motive that may cause him or
14 her to shade the truth? Or does the witness have
15 some bias, prejudice, or hostility that may have
16 caused the witness, consciously or not, to give you
17 something other than a completely accurate account
18 of the witness's -- of the facts he or she
19 testified to?

20 Now, even if the witness was impartial, you
21 should consider whether the witness had an
22 opportunity to observe the facts he or she
23 testified about. You know, a lot of these go back
24 a number of years. And you should also consider
25 the witness's ability to express himself or

1 herself, and I think it's obvious some witnesses do
2 a better job than others. Ask yourselves whether
3 the witness's recollection of the facts stands up
4 in light of all of the other evidence.

5 In other words, what you must try to do in
6 deciding credibility is to size a person up in
7 light of his or her demeanor, the explanations
8 given, and in light of all the other evidence in
9 the case, just as you would in any important matter
10 where you are trying to decide if a person is
11 truthful, straightforward, and accurate in his or
12 her recollection. In deciding the question of
13 credibility, remember that you should use your
14 common sense, your experience, your judgment, your
15 intelligence.

16 There has been evidence in this case that the
17 defendant Mark Kamholz made certain statements in
18 which the government claims he admitted certain
19 facts charged in the indictment. In deciding what
20 weight to give to the defendant's statements, you
21 should first examine with great care whether each
22 statement was made and whether, in fact, it was
23 voluntarily and understandingly made. I instruct
24 you that you are to give the statements such
25 weight -- and we've talked about this -- as you

1 feel they deserve in light of the evidence. You
2 determine the weight, how important is what you are
3 considering. And, you know, you get to that, too,
4 by respecting each other and your opinions, and
5 your discussions will -- you know they should be
6 open. Just let everybody say their piece and get
7 to where you have to resolve these fact issues, the
8 credibility of the witnesses, whether the
9 sufficiency satisfies the burden of proof beyond a
10 reasonable doubt.

11 You know, you had witnesses of all kinds in
12 here. Some were federal and state law enforcement
13 officers, EPA, DEC, et cetera, et cetera. And the
14 fact that any of those witnesses may be employed by
15 the federal or state government as a law
16 enforcement official, that in and of itself does
17 not mean that his or her testimony is necessarily
18 deserving of more or less consideration or greater
19 or lesser weight than that of an ordinary witness.

20 At the same time, it is quite legitimate for
21 the defense to try to attack the credibility of law
22 enforcement witnesses on the grounds that his or
23 her testimony may be colored by a personal or
24 professional interest in the outcome of the case.

25 It is your decision, after reviewing all the

1 evidence, whether to accept the testimony of the
2 law enforcement witnesses and to give that
3 testimony whatever weight, if any, you find it
4 deserves.

5 Okay. Now, we're still -- credibility, you've
6 heard terms of, you know, contradictions in
7 testimony or statements or impeachment. And in
8 this case there was evidence that a witness may
9 have made a statement on an earlier occasion, which
10 maybe tomorrow you'll hear the attorneys argue is
11 inconsistent with that witness's trial testimony.

12 Keep this in mind: Evidence of a prior
13 inconsistent statement, okay, something that was
14 different than what was testified to in trial, is
15 not to be considered by you -- and this is part of
16 that instruction, okay -- as affirmative evidence
17 bearing on the guilt of the defendants.

18 And that sounds a little complicated, but it's
19 not. What that really means is evidence of prior
20 inconsistent statements was placed before you for
21 the more limited purpose of helping you decide
22 whether to believe -- that is the credibility --
23 the trial testimony of the witness who contradict
24 himself or herself. If you find that a witness
25 made an earlier statement that conflicts with his

1 or her trial testimony, you may consider that fact
2 in deciding how much of that witness's testimony,
3 if any, to believe.

4 Now, in making that determination, you may
5 consider whether the witness purposely made a false
6 statement or whether it was an innocent mistake;
7 whether the inconsistency concerns an important
8 fact or whether it had to do with a small detail;
9 whether the witness had an explanation for the
10 inconsistency, and whether that explanation
11 appealed to your common sense. Common sense,
12 right? I mean, it kind of works into everything.

13 It is exclusively your duty, based upon all the
14 evidence and your own good judgment, to determine
15 whether the prior statement was, in fact,
16 inconsistent and, if so, how much, if any, weight
17 to be given to the inconsistent statement in
18 determining whether to believe all or part of the
19 witness's testimony.

20 Again, in evaluating the believability or the
21 credibility of the witnesses, you should take into
22 account any evidence that the witness who testified
23 may benefit in some way from the outcome of this
24 case. Such an outcome in the -- or interest in the
25 outcome of the case creates a motive to testify

1 falsely and may sway the witness to testify in a
2 way that advances that witness's own interest.

3 So, therefore, if you find that any witness
4 whose testimony you are considering may have an
5 interest in the outcome of this trial, then you
6 should bear that factor in mind when evaluating the
7 credibility of his or her testimony, and --
8 what? -- you accept it with great care, because
9 there are interests that might come into play.

10 That's not to suggest to you that every witness
11 who has an interest in the outcome of a case will
12 testify falsely. That's simply not the case. It
13 is for you to decide to what extent, if at all, the
14 witness's interest has affected or colored his or
15 her testimony.

16 In connection with your evaluation of the
17 believability of the witnesses, you should
18 specifically consider evidence of resentment or
19 anger which some government witnesses may have
20 toward the defendants. Evidence that a witness is
21 biased, prejudiced, or hostile towards the
22 defendants requires you to view that witness's
23 testimony with caution, to weigh it with care, and
24 subject it to close and searching scrutiny.

25 Now, although the defendants are under

1 indictment, right, you should remember and you must
2 remember that an indictment is only an accusation.
3 It is not by any stretch evidence.

4 The defendants have pleaded not guilty to each
5 count of the indictment, and as a result of their
6 pleas of not guilty, once again, the burden is on
7 the prosecution to prove guilt beyond a reasonable
8 doubt. You've heard me say this countless times.
9 The burden never shifts to the defendants, for the
10 simple reason that the law never imposes upon the
11 defendant in a criminal case the burden or duty of
12 calling any witness or producing any evidence. The
13 law presumes a defendant to be innocent of all
14 charges against him, or it, and I therefore
15 instruct you that the defendants are to be presumed
16 by you to be innocent throughout your deliberations
17 until such time, if ever, you as a jury are
18 satisfied that the government has proven either or
19 both defendants guilty beyond a reasonable doubt.

20 Now, the defendants begin the trial with a
21 clean slate. That presumption of innocence is that
22 clean slate, and it alone is sufficient -- the
23 presumption of innocence is alone sufficient to
24 acquit a defendant, to find him or it not guilty,
25 unless you as jurors are unanimously convinced

1 beyond a reasonable doubt of the defendant's guilt
2 after a careful and impartial consideration of all
3 of the evidence in this case.

4 If the government fails to sustain its
5 burden -- what? -- you must find the defendants not
6 guilty. The presumption was with the defendants
7 when the trial began, and remains with them even
8 now as I speak to you, and will continue with the
9 defendants into your deliberations unless and until
10 you are convinced that the government has proven
11 their guilt beyond a reasonable doubt.

12 Let's just talk about that, because you've
13 heard me say that so many times. Beyond a
14 reasonable doubt. That's what the government must
15 prove. Okay. So what is a reasonable doubt?
16 Well, again, using common sense, experience,
17 intelligence, those words virtually define
18 themselves.

19 Beyond a reasonable doubt is a doubt based upon
20 reason and common sense. Beyond a reasonable
21 doubt. It is a doubt that a reasonable person has
22 after carefully weighing all of the evidence. It
23 is a doubt which would cause a reasonable person to
24 hesitate to act in a matter of importance in his or
25 her personal life. Proof beyond a reasonable doubt

1 must therefore be proof of such a convincing
2 character that a reasonable person would not
3 hesitate to rely and act upon it in the most
4 important of his or her own affairs.

5 Now, again, that's what reasonable doubt is,
6 but it is not a caprice or a whim. It is not
7 speculation. It is not suspicion. It is not an
8 excuse to avoid the performance of an unpleasant
9 duty, and also it is not sympathy. Right?

10 So you've got the definition. Beyond a
11 reasonable doubt.

12 In a criminal case the burden is at all times
13 upon the government to prove guilt beyond a
14 reasonable doubt. The law does not require that
15 the government prove guilt beyond all possible
16 doubt. That's not the standard. It's beyond a
17 reasonable doubt.

18 Proof beyond a reasonable doubt is sufficient
19 to convict. That burden -- you've heard me say
20 this so many times -- never shifts to the
21 defendants, which means that it is always the
22 government's burden to prove each of the essential
23 elements of the crime charged beyond a reasonable
24 doubt. And, ladies and gentlemen, if after fair
25 and impartial consideration of all the evidence you

1 have a reasonable doubt, then what's your duty?

2 Your duty is to acquit.

3 On the other hand, if after -- and we insist on
4 this, and you know we're talking about a fair and
5 impartial consideration of all the evidence, you
6 are satisfied of the defendants' guilt beyond a
7 reasonable doubt, what should you do? You should
8 vote to convict.

9 Now, you know that in this case the defendant
10 Mark Kamholz did not testify in this case, and
11 under our constitution, yours and mine, he has no
12 obligation to testify or present any other
13 evidence, because it is the prosecution's burden to
14 prove the defendants guilty beyond a reasonable
15 doubt. That burden stays with the prosecution,
16 through the entire trial, never shifts. The
17 defendants are never required to prove that they
18 are innocent.

19 They have both entered not guilty pleas. You
20 may not attach any significance to the fact that
21 the defendant Mark Kamholz did not testify. No
22 adverse inference against him may be drawn by you
23 because he did not take the witness stand. You may
24 not consider this against him in any way in your
25 deliberations in the jury room.

1 Now, I've talked about Mark Kamholz, and the
2 other defendant, as you know, is the Tonawanda Coke
3 Corporation. And it is a corporation, and under
4 the constitution and laws of this country a
5 corporation is a person under the law and may be
6 found guilty of an offense charged. Of course, a
7 corporation, again fundamentally, is not a human
8 being, and as such, a corporation acts only through
9 its agents and employees. That is, by those
10 officers, agents, employees, or other persons
11 authorized or employed to act for it. The agents
12 of a corporation include its officers, directors,
13 employees, and certain others who are authorized to
14 act for it.

15 A corporate defendant, here Tonawanda Coke, is
16 entitled to the same impartial consideration of the
17 evidence that you must give to a human being
18 defendant such as Mark Kamholz. A corporation may
19 be found guilty of the offense charged or be found
20 not guilty of this offense charged under the same
21 instructions that apply to a human being defendant.
22 Common sense, right? Beyond a reasonable doubt.

23 To sustain its burden of proof on any charge as
24 to Tonawanda Coke, the government must prove beyond
25 a reasonable doubt each of the following:

1 First, the offense charged was committed by
2 agents or employees of the Tonawanda Coke
3 Corporation.

4 Second, the acts by the agents or employees
5 were committed within the authority or scope of
6 their employment.

7 And third, in committing the offense, the
8 agents or employees of Tonawanda Coke intended at
9 least in part to benefit the defendant corporation.

10 For an act to be within the authority of an
11 agent or the scope of the employment of an
12 employee, it must deal with a matter that's
13 performance is generally entrusted to the agent or
14 employee by the defendant corporation.

15 It is not necessary that the particular act was
16 itself authorized or directed by Tonawanda Coke.
17 If an agent or an employee was acting within the
18 scope of their authority or employment and at least
19 in part for the benefit of the company, Tonawanda
20 Coke is not relieved of its responsibility because
21 the act was illegal, contrary to its instructions,
22 or against its general policies. You may, however,
23 consider the existence of Tonawanda Coke's policies
24 and instructions and the diligence of its efforts
25 to enforce them in determining whether the agents

1 or employees were acting with intent to benefit
2 Tonawanda Coke or within the scope of their
3 employment and at least in part for Tonawanda
4 Coke's benefit.

5 Now, a person may be found guilty of a
6 violation of the Clean Air Act or the Resource,
7 Conservation, and Recovery Act, RCRA, as a
8 responsible corporate officer if the government
9 proves beyond a reasonable doubt that, first, the
10 person had actual knowledge of the facts that give
11 rise to the violation; second, that the person had
12 the authority and capacity to prevent the
13 violation; and third, that the person failed to
14 prevent the violation.

15 Okay. Heard enough? Okay. We're going stop
16 there. Okay. We're going to talk tomorrow about
17 the indictment that contains the charges against
18 the defendants. I'll be reminding you that the
19 indictment is not evidence. It's an accusation.
20 It describes the charges. It's not to be
21 considered as evidence.

22 So in reaching that determination, you just,
23 from your standpoint, have to resolve whether the
24 defendants' guilt has been established beyond a
25 reasonable doubt, and consider only the evidence or

1 lack of evidence that has been given to you in this
2 case.

3 You know, I think it's enough. You've got a
4 lot to absorb. You've had somewhat of a long day.
5 But we're going make sure you get rested tomorrow,
6 and then we'll start at noonish. And we'll have
7 the closing arguments tomorrow, and they should
8 wrap up, and then, you know, I'll go into some more
9 explicit details with respect to those elements and
10 definitions and each count to be considered
11 separately.

12 And, you know, you have blocks of counts of the
13 indictment that relate to, you know, the Clean Air
14 Act or the RCRA or -- and that kind of thing. So,
15 you know, we'll get into that tomorrow. And then
16 you'll start your work, and you'll get these fact
17 issues resolved. And I'm confident that you'll
18 come through with what you promised, that you would
19 do your very best to reach a unanimous verdict on
20 all the counts in the indictment here, starting
21 probably tomorrow when you get the case for your
22 deliberations. Okay.

23 Look at this. You've got 20 minutes, an early
24 quit for the day. How much better can it get than
25 that?

1 Thank you very much. Don't discuss the case.
2 Keep your minds open. Don't do any independent
3 research.

4 From the attorneys' standpoint, did I miss
5 anything that I should be addressing?

6 MR. MANGO: No, your Honor.

7 MR. LINSIN: No. We're satisfied, your
8 Honor.

9 THE COURT: Okay.

10 MR. PERSONIUS: No, your Honor. Thank
11 you.

12 THE COURT: Okay. Thank you sincerely.
13 You know, keep all the stuff in your head. It will
14 all coalesce; it will all work out. We'll see you
15 tomorrow at what time?

16 THE JURY: Noon.

17 THE COURT: 12:00 o'clock. Okay. And
18 thank you very much.

19 (Jury excused from the courtroom.)

20 THE COURT: Okay. Tomorrow at 9:30 we'll
21 have the charge conference. We'll get that set as
22 quickly as we can, give you time to get geared up.

23 MR. LINSIN: Okay.

24 THE COURT: Okay?

25 MR. MANGO: All right.

1 THE COURT: And you want to handle -- the
2 attorneys have to sign off on the exhibit list.

3 THE CLERK: Yeah. And it will have to be
4 done then after -- unless you're ready to give me
5 the exhibits now, it will have to be done after
6 closings but before the final charge. Because the
7 exhibits have to be ready to go to the jury as soon
8 as the judge finishes the charge.

9 THE COURT: Right. I know the paralegals
10 have been working and are very comfortable with
11 where we're at, but it requires the attorneys to
12 sign off. And Colleen will take over tomorrow for
13 Mary. She has been fully advised, and she'll be
14 the one responsible for getting the list, the
15 exhibits, the charge and everything to the jury.
16 But I like to get it as promptly after the finality
17 of the charge to the jury so that they can get
18 right into the deliberations. Okay?

19 MR. MANGO: Good.

20 THE COURT: So review what you have to
21 tonight with your paralegals. Make sure that you
22 don't have any issues as far as the exhibits.

23 Thank you very much. We'll see you tomorrow at
24 9:30.

25 MR. LINSIN: Thank you, your Honor.

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CERTIFICATION

I certify that the foregoing is a
Correct transcription of the proceedings
Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.